TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 194

OLD COLONY TRUST COMPANY, AS TRUSTEE,
APPELLANT,

vs.

THE CITY OF SEATTLE, COUNTY OF KING, W. W.
SHIELDS, AS TREASURER, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

FILED NOVEMBER 3, 1924

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[fols. a-1] **IN UNITED STATES DISTRICT COURT**

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[fol. 2] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

In Equity

No. 403–E

OLD COLONY TRUST COMPANY, Trustee, Plaintiff,

v.

THE CITY OF SEATTLE, THE COUNTY OF KING, W. W. SHIELDS, as Treasurer of King County, and Matt W. Starwich, as Sheriff of King County, Defendants.

BILL OF COMPLAINT—Filed May 22, 1924

To the Honorable the Judges of the District Court of the United States for the Western District of Washington, Northern Division, sitting in equity:

Old Colony Trust Company, a corporation created and existing under the laws of the State of Massachusetts, brings this its bill of complaint against The City of Seattle and The County of King, municipal corporations created and existing under the laws of the State of Washington, located in the County of King and the

Northern Division of the Western District of Washington, and W. W. Shields as Treasurer of the County of King, and Matt W. Starwich as Sheriff of the County of King, each being a citizen of the State of Washington and a resident of King County in the Northern Division of the Western District of Washington, and thereupon the plaintiff complains and shows unto your Honors as follows:

I

The plaintiff is and at all times hereinafter mentioned was a corporation created and existing under the laws of the State of Massachusetts.

[fol. 3]

II

The defendants, The City of Seattle and The County of King, for more than eight years last past have been and each now is a municipal corporation created and existing under the laws of the State of Washington, located in the Northern Division of the Western District thereof. The defendants, W. W. Shields and Matt W. Starwich, are citizens of the State of Washington and residents of King County in the Northern Division of the Western District of Washington. The defendant W. W. Shields is the duly qualified and acting Treasurer of King County. The defendant Matt W. Starwich is the duly qualified and acting Sheriff of King County.

III

In this complaint, wherever hereafter the word "city" is used it means the City of Seattle, and wherever the word "county" is used it means the County of King, and wherever the word "company" is used it means Puget Sound Power & Light Company.

IV

On February 10, 1919, the city and the company entered into a contract whereby the company agreed to convey to the city the street railway system of the company in the City of Seattle to the city for the considerations and upon the terms and conditions mentioned and set forth in such contract, which contract was executed pursuant to Ordinances 39025 and 39069 duly enacted by the city.

V

In order to convey such property free and clear from lien the plaintiff was obliged to release such property from the lien of a mortgage which the plaintiff then had upon such property. The form of contract prescribed by Ordinance 39069 and the ordinances authorizing such contract had been held valid by the Supreme Court of the State of Washington.

[fol. 4] Such contract provided:

"That state, county and municipal taxes levied against the property for the year 1919 shall be paid, before the same shall become delinquent, by the respective parties hereto in amounts proportional to the respective periods of time that said parties are respectively in possession of said property during the year 1919."

VI

The plaintiff executed a release of its mortgage upon the property so as to allow the company to convey it to the city on the terms and conditions set forth in the contract and in the deed by which the company conveyed the property to the city. On March 31, 1919, the deed for the property was delivered by the company to the city conveying the property therein described. No tax had then been levied upon the property. The deed contained the following provision:

"It is also further agreed between the parties hereto that if at the time of the delivery of this deed any lien shall have attached to the property or any part thereof for the year 1919 for any tax for the year 1919, such lien shall not constitute a breach of warranty and that if such tax shall become collectible the same shall be paid, before the same shall become delinquent, by the respective parties hereto in amounts proportionate to the respective periods of time that the said parties are respectively in possession of said property during the year 1919."

The deed was accepted by the city on March 31, 1919, was filed for record and recorded in the office of the Auditor of King County, State of Washington, and the city entered into possession of the property and has received therefrom the revenues amounting to, approximately, more than twenty-five million dollars or more.

VII

Thereafter, state, county, school district and city taxes were levied by the County Commissioners for King County and by The City of Seattle, upon the street railway property conveyed in such deed from [fol. 5] the company to the city, and such taxes have been declared by the Supreme Court of the State of Washington to be a valid lien upon the street railway property, and that such taxes were a valid lien upon such street railway property at the time the city acquired the property under such contract and deed.

VIII

The principal of such taxes amount to over four hundred thousand dollars, of which amount one hundred seventy nine thousand, three hundred sixty-five dollars and seventy-six cents represent taxes for the year 1919 levied by the city upon such property after executing the contract and accepting the deed hereinbefore mentioned.

IX

The city and the company, claiming that the street railway property was not subject to taxation for the year 1919, litigated the validity of the taxes with the County of King and its officers, but the Supreme Court of the State of Washington held that the property was subject to taxes for the year 1919 and that the city acquired such property subject to such taxes.

X

In July, 1922, before the final decree of the Supreme Court of the State of Washington was entered in such tax litigation, but after the Supreme Court of the State had rendered its decision, the company requested the city to join with it in paying such taxes, with interest, such payment to be made under protest, but the city failed and refused to take any action in the matter.

XI

The city is in possession of all of the property which the company conveyed to it by such deed, excepting such portions of the property as the city has from time to time sold. The company has offered, both to the city and to the Treasurer of King County, to pay its share of the taxes, with interest thereon, or to pay to the city the share of the company's taxes, with interest, so that with such amount the [fol. 6] city may pay the full amount of taxes, with interest, constituting a lien upon the street railway property which it received under such contract and deed and is now operating in the City of Seattle. The defendant County Treasurer has refused to accept such offer, has demanded that the company pay the entire amount of said state, county, school district and city taxes, with interest at fifteen per cent per annum from March 15, 1919, and that in the event of its failure so to do he will issue a warrant of distress and have the property of the company seized by the Sheriff of the county and sold to satisfy the entire amount of such taxes, although the company has paid all of its taxes for the year 1919, excepting only its portion of the tax for that year upon the street railway property, which the company is ready and willing to pay, but payment of which the County Treasurer refuses to accept. The defendant Sheriff of King County has announced that he will seize the property of the company to satisfy the full amount of the taxes and if necessary will sell and remove the same from the possession of the company.

XII

The plaintiff is Trustee under a certain mortgage executed by Puget Sound Power & Light Company to the plaintiff, dated May 2, 1921, securing an issue of upwards of thirteen million dollars of negotiable bonds of the company, which bonds are in the hands of persons in various parts of the United States, who purchased such

bonds as secured by such mortgage. Such mortgage was filed and recorded as a real and chattel mortgage in the office of the Auditor of King County, State of Washington, and was so recorded on May 17, 1921, and ever since its execution it was and it now is a lien upon all of the property of the company upon which the defendants are threatening to levy in order to satisfy the taxes hereinbefore [fol. 7] mentioned. The taxes hereinbefore mentioned constitute a specific lien upon the municipal street railway conveyed by the company to the city on March 31, 1919, and such property is easily available for the satisfaction of such taxes if the defendant County Treasurer and the defendant Sheriff see fit to seize such property in order to satisfy such taxes. The offices of the defendant County Treasurer and the defendant Sheriff and of the advisers of such officers, are located in the County-City Building in the City of Seattle, where the county and city offices are located, and the street railway system upon which such taxes are a specific lien have more than two hundred miles of track, with all of the necessary equipment for operating the street railway, so that such taxes can easily be satisfied out of the property upon which they are a specific lien; but the city and the county, their officers and agents, have entered into a combination and confederation to refuse to collect such taxes out of such street railway system upon which the taxes are a specific lien, and to coerce by threats of distraint, seizure and sale the property of the company covered by the mortgage of this plaintiff, on which property all taxes have been paid, in order to force the company to pay not only the state, county and school district taxes in full, with interest thereon, notwithstanding such contract and deed entered into between the city and the company, but also taxes levied by the city upon its own property, with interest at the rate of fifteen per cent per annum from March 15, 1919, because the city refuses to comply with the provisions of the contract entered into between the company and the city and declared valid by the Supreme Court of the State of Washington.

[fol. 8]

XIII

The company is a public service corporation serving thousands of people with electrical energy for light and power and any interference with its property would cause great and irreparable damage to this plaintiff as Trustee for the bondholders and damage its security. This plaintiff is not seeking to interfere with the collection of any tax, but is seeking to protect its security covered by its mortgage from being assessed and sold to pay taxes not against the property covered by such mortgage, and to prevent the combination and confederation entered into by the City of Seattle and County of King and their officers and agents to sacrifice the security of the plaintiff and subject it to the payment of the obligations of the City of Seattle.

XIV

The defendant Sheriff has announced that he will within the next twenty-four hours seize the property of the company, which prop-

erty is covered by the plaintiff's mortgage, in order to satisfy such taxes, and unless he should be restrained from so doing the plaintiff as Trustee, and the bondholders whose bonds are secured by the trust mortgage hereinbefore mentioned, will be irreparably injured and damaged and the security of the plaintiff will be dissipated by reason of the fraudulent acts of the City of Seattle and the County of King in seizing the property covered by the plaintiff's mortgage to satisfy the obligation of the city.

Forasmuch as the plaintiff can have no adequate relief except in this court, and to the end, therefore, that the defendants may, if they can, show why the plaintiff should not have the relief herein prayed and make a full disclosure and discovery of all the matters aforesaid and according to the best and utmost of their knowledge, [fol. 9] remembrance, information and belief, full, true, direct and perfect answer make to the matters in this bill of complaint hereinbefore stated, but not under oath, an answer under oath being hereby expressly waived, the plaintiff prays:

1. That a temporary injunction be issued restraining the defendants, The County of King, W. W. Shields as County Treasurer, Matt W. Starwich as County Sheriff, and all officers and agents of the county and the city from in any manner seizing or interfering with or threatening to seize or interfere with any of the property described in the deed of trust hereinbefore mentioned, recorded in the office of the Auditor of King County, State of Washington, in volume 822 of Mortgages at page 1, and filed as a chattel mortgage in the office of the Auditor of King County under File No. 68307 and filed on the 23rd day of May, 1921, with the City Comptroller and ex-officio City Clerk of the City of Seattle, Washington.

2. That upon the final hearing and determination said defendants and each of them be perpetually restrained and enjoined from seizing or in any manner interfering with any of such property until they have proceeded to collect such taxes out of the street railway property in the possession of the City of Seattle, described in the contract and deed hereinbefore mentioned, and which is readily available for the satisfaction of such taxes, and that the plaintiff have such other and further relief as the equities of the case may require and to your Honors may seem meet.

May it please your Honors to grant unto the plaintiff, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States directed to The City of Seattle, The County of King, W. W. Shields, as Treasurer of King County, [fol. 10] Matt W. Starwich as Sheriff of King County, commanding them and each of them on a day certain to appear and answer unto this bill of complaint and to obey and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience, and that the plaintiff be allowed to recover its proper costs and disbursements of this suit.

Old Colony Trust Company, as Trustee, by James B. Howe,
Its Solicitor.

[fol. 11] [File endorsement omitted.]

[fol. 12] IN THE UNITED STATES DISTRICT COURT

SUMMONS AND MARSHAL'S RETURN—Filed May 22, 1924

The President of the United States of America to The City of Seattle, The County of King, W. W. Shields, as Treasurer of King County, and Matt W. Starwich, as Sheriff of King County, Greeting:

You are hereby commanded, that you be and appear in said District Court of the United States aforesaid, at the Court Room of said Court, in the City of Seattle on the 11th day of June, 1924, to answer a Bill of Complaint filed against you in said Court by Old Colony Trust Company, Trustee, and to do and receive what the Court shall have considered in that behalf. And this you are not to omit under the penalty of the law.

Witness the Honorable Edward E. Cushman, Judge of said Court, and the seal thereof, at Seattle, Washington, this 22nd day of May, 1924.

F. M. Harshberger, Clerk, by S. M. H. Cook, Deputy Clerk.
(Seal.)

Memorandum Pursuant to Rule 12, Supreme Court U. S.

You are hereby required to enter your appearance in the above mentioned suit on or before twenty days from the date of service, excluding the day thereof, at the Clerk's office of said Court, pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

F. M. Harshberger, Clerk, by S. M. H. Cook, Deputy Clerk.

[File endorsement omitted.]

Marshal's Return

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify that I have served the within writ by delivering to and leaving a true copy thereof with The City of Seattle, by serving H. W. Carrol, comptroller of city; King County by serving William A. Gaines, chairman board of county commissioners; W. W. Shields, treasurer of said county; and Matt W. Starwich, as sheriff of King County.

E. B. Benn, United States Marshal, by Joseph Knizek, Deputy.

May 22, 1924.

Fees: $8.20/100.

[fol. 13] IN UNITED STATES DISTRICT COURT

ALIAS SUBPŒNA AND MARSHAL'S RETURN—Filed May 28, 1924

The President of the United States of America to The City of Seattle, Greeting:

You are hereby commanded that you be and appear in said District Court of the United States aforesaid, at the Court Room of said Court, in the City of Seattle on the 17th day of June, 1924 to answer a Bill of Complaint filed against you in said Court by the Old Colony Trust Company, and to do and receive what the Court shall have considered in that behalf. And this you are not to omit under the penalty of the law.

Witness the Honorable Edward E. Cushman, Judge of said Court, and the seal thereof, at Seattle, Washington, this 28th day of May, 1924.

F. M. Harshberger, Clerk, by S. M. H. Cook, Deputy Clerk.
(Seal.)

Memorandum Pursuant to Rule 12, Supreme Court U. S.

You are hereby required to enter your appearance in the above mentioned suit on or before twenty days from the date of service, excluding the day thereof, at the Clerk's office of said Court, pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

F. M. Harshberger, Clerk, by S. M. H. Cook, Deputy Clerk.

[File endorsement omitted.]

Marshal's Return

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify that I have served the within writ by delivering to and leaving a true copy thereof with City of Seattle by serving H. W. Carroll, Comptroller of City.

E. B. Benn, United States Marshal, by Joseph Knizek, Deputy.

May 28, 1924.

Fees: $2.00.

[fol. 14] IN UNITED STATES DISTRICT COURT

ALIAS SUBPOENA AND MARSHAL'S RETURN—Filed May 31, 1924

The President of the United States of America to the City of Seattle, Greeting:

You are hereby commanded that you be and appear in said District Court of the United States aforesaid, at the Court Room of said Court, in the City of Seattle on the 18th day of June, 1924, to answer a Bill of Complaint filed against you in said Court by the Old Colony Trust Company and to do and receive what the Court shall have considered in that behalf. And this you are not to omit under the penalty of the law.

Witness the Honorable Edward E. Cushman, Judge of said Court, and the seal thereof, at Seattle, Washington, this 29th day of May, 1924.

F. M. Harshberger, Clerk, by S. M. H. Cook, Deputy Clerk.
(Seal.)

Memorandum Pursuant to Rule 12, Supreme Court U. S.

You are hereby required to enter your appearance in the above mentioned suit on or before twenty days from the date of service, excluding the day thereof, at the Clerk's office of said Court, pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

F. M. Harshberger, Clerk, by S. M. H. Cook, Deputy Clerk.

[File endorsement omitted.]

Marshal's Return

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify that I have served the within writ by delivering to and leaving a true copy thereof with Mayor E. J. Brown.

E. B. Benn, United States Marshal, by A. M. Smith, Deputy.

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BILL

Now comes the above named plaintiff and prays that it be allowed to file its supplemental bill because since the filing of the original and the issuance and service of the subpoenas thereon Matt Starwich, the Sheriff of King County, refused to accept payment of any of the

taxes mentioned in such bill less than the full amount with interest up to date of each and all of such taxes in the aggregate, and thereafter levied upon the property covered by the plaintiff's mortgage and has advertised the same for sale, which acts occurred since the institution of the above entitled suit, and that the plaintiff have such other and further relief as may be just.

James B. Howe, Solicitors for Plaintiff.

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING LEAVE TO FILE SUPPLEMENTAL BILL—Filed June 2, 1924

The motion of the plaintiff for leave to file its supplemental bill and to shorten the time for hearing such motion coming on for hearing,

It is ordered that the time for hearing the motion for leave to file such supplemental bill is fixed for 11:00 o'clock a. m. June 2, 1924.

It is further ordered that the plaintiff have leave to file such supplemental bill.

Edward E. Cushman, Judge.

[File endorsement omitted.]

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL BILL OF COMPLAINT—Filed June 2, 1924

To the Honorable the Judges of the District Court of the United States for the Western District of Washington, Northern Division, sitting in equity:

Old Colony Trust Company, a corporation created and existing under the laws of the State of Massachusetts, as trustee, the plaintiff in the above entitled suit, by leave of court first obtained, brings this its bill of complaint against the City of Seattle, the County of King, municipal corporations created and existing under the laws of the State of Washington, located in King County in the Northern Division of the Western District of Washington, and W. W. Shields as Treasurer of the County of King and Matt Starwich as Sheriff of the County of King, each a citizen of the State of Washington and a resident in King County, in the Northern Division of the Western District of Washington, and thereupon the plaintiff complains and shows unto Your Honors as follows:

1. That on the 22nd day of May, 1924, the plaintiff filed its bill [fol. 18] of complaint in the above entitled court against these defendants and each of them and caused subpœnas directed to the defendants and each of them to be forthwith issued and placed in the hands of the United States Marshal/ for service, and on the same date the marshal/ did make service of such subpœnas upon the County of King, Matt Starwich as Sheriff of King County, W. W. Shields as Treasurer of King County, and upon the City Comptroller of the City of Seattle, and since such service upon the City Comptroller an alias subpœna has been issued for service upon the City of Seattle by delivery of the same to the Mayor of such city, and plaintiff believes that such service has been made.

2. The original bill alleged that the City of Seattle and Puget Sound Power & Light Company, hereinafter called the company, on the 10th day of February, 1919, entered into a certain contract; whereby the Company agreed to sell to the City and the City agreed to purchase from the Company certain street railway property; that such property had not then been assessed for taxes for the year 1919; that such contract contained the following provision:

"That state, county and municipal taxes levied against the property for the year 1919 shall be paid, before the same shall become delinquent, by the respective parties hereto in amounts proportional to the respective periods of time that said parties are respectively in possession of said property during the year 1919."

That thereafter the property was assessed for taxation and state, county, school district and city taxes were levied upon such property for the year 1919, and on the 31st of March, 1919, prior to such levy, the company delivered its deed pursuant to such contract to the City and the City accepted such deed, which deed contained the following provision:

"It is also further agreed between the parties hereto that if at the [fol. 19] time of the delivery of this deed any lien shall have attached to the property or any part thereof for the year 1919, for any tax for the year 1919, such lien shall not constitute a breach of warranty, and that if such tax shall become collectible the same shall be paid, before the same shall become delinquent, by the respective parties hereto in amounts proportionate to the respective periods of time that the said parties are respectively in possession of said property during the year 1919."

3. That thereafter the City and the Company, in litigation with the County of King, claimed that such property was not subject to taxes for the year 1919, but such taxes were held valid liens upon such property by the Supreme Court of the State of Washington, and the Company requested the City to join in paying such taxes in accordance with such contract and deed, but the City failed and refused to pay such taxes or any part thereof.

4. The plaintiff during May, 1921, and ever since, has been the trustee under a certain mortgage executed by the Company to the

plaintiff to secure an issue of more than ten million dollars of bonds, which bonds are held by various persons throughout the United States. The mortgage securing such bonds was duly recorded in the office of the Auditor of King County, State of Washington, as a real mortgage, and filed as a chattel mortgage, and a copy thereof was filed in the office of the City Comptroller of the City of Seattle. Such mortgage is a lien upon all of the property of the Company in King County and ever since its execution of record has been a lien upon all of such property.

5. The plaintiff filed its original bill, alleging that the City of Seattle and the County of King had entered into a combination [fol. 20] and confederation to seize the property covered by the plaintiff's mortgage and sell the same to satisfy the taxes thereinbefore mentioned, constituting specific liens upon the street railway property sold by the Company to the City of Seattle, and which street railway property ever since such sale has been in the possession of the City of Seattle. The County Treasurer defendant and the County Sheriff defendant have made no attempt to collect any portion of such taxes from the City of Seattle and have failed and refused to seize any of the street railway property subject to the specific lien of such taxes and have failed to accept from the Company payment of any one of such taxes with interest and costs up to date, but have demanded payment from the company of all of such taxes in a lump sum with interest up to date, and refused to take any steps whatsoever to collect such taxes or any part thereof from the City of Seattle or the property subject to the lien of such taxes.

6. On the 23rd day of May, 1924, after the bill of complaint was filed in the above entitled court against the above named defendants, and after process had been issued upon such bill and placed in the hands of the marshal, and after service of such process upon the defendants W. W. Shields, the County of King, Matt Starwich and upon the City Comptroller of the City of Seattle, the Sheriff, Matt Starwich, with full knowledge or means of knowledge of the contents of such bill of complaint made demand upon the company for the payment of all such taxes and refused to allow the company to pay the State tax with interest up to date and costs, the County tax with interest up to date and costs and the School District tax with interest up to date and costs unless the Company would also pay the City tax with interest up to date with costs, and stated that no sum less than [fol. 21] the full amount of all of such taxes with interest up to date would be accepted by him. He also stated that he would not accept payment of the full amount of the City tax with interest up to date and with costs unless all other taxes should also be paid. The defendant Sheriff then levied upon a large amount of property said to be worth two million dollars, all of which was subject to the lien of the plaintiff's mortgage and which said Sheriff was advised and knew was subject to such mortgage, and notwithstanding his refusals to accept the payment of any one of such taxes said Sheriff after such seizure posted notice that he would sell such property at public sale to satisfy such taxes with interest and costs on the 10th day of June,

1924, and unless restrained by injunction said sheriff will proceed and sell such property, dissipate the security of the plaintiff and compel payment of all of such taxes notwithstanding his refusal to accept the tenders hereinbefore mentioned or any one of them. The action of said sheriff was advisedly taken with full knowledge that the plaintiff was seeking an injunction to prevent such levy and to require said Sheriff to first resort to the street railway property upon which the taxes were specific liens, but said Sheriff and the County Treasurer, the County of King and the City of Seattle are acting in concert and collusion to force the payment of the taxes for the year 1919 upon the street railway property owned by the City from the property covered by the mortgage of the plaintiff and to compel either the plaintiff or the Company by the seizure of such mortgaged property to pay all of such taxes, including the amount of City taxes levied by the City upon its own property after the making of its contract with the Company. There was and is no reason for the levy upon the property covered by the plaintiff's mortgage prior to [fol. 22] the hearing of the application of the plaintiff for an injunction to restrain the defendants from making any such levy until the final hearing and determination of the above entitled cause, but the action of the Sheriff and the other defendants was for the purpose of compelling the payment of all of such taxes before the above entitled court could hear and determine the application of the plaintiff for an injunction restraining such levy upon the mortgaged property.

7. The reason for filing this supplemental bill is that such levy and notice of sale were made and given by Matt Starwich as Sheriff of King County after the filing of the original bill praying an injunction to restrain him from making such levy and from in any manner interfering with the property covered by the plaintiff's mortgage and because of the refusal of said Matt Starwich to allow the company to pay any of the taxes separately with interest up to date and costs, and that after such refusal all of his act*o*in making such levy and posting such notice of sale were fraudulent, oppressive and unlawful and had for their object compelling payment before the above entitled court could hear the cause or act on plaintiff's application for a temporary injunction.

8. If the plaintiff by reason of such acts should be compelled to pay such taxes or any portion thereof, then the plaintiff should be subrogated to the lien of the State of Washington, the County of King, School District No. 1 and the City of Seattle for such taxes upon the street railway property of the City of Seattle upon which such taxes are specific liens, and the City of Seattle should be compelled to pay its portion of all of such taxes to the plaintiff in accordance with the contract between the City and the Company.

9. If W. W. Shields as County Treasurer and Matt Starwich as County Sheriff of King County should demand payment of such [fol. 23] taxes from the City of Seattle, the Company is ready and willing to pay its share of the amount of such taxes with interest

thereon as the same may be decreed by this court, and if such company should not pay its share this plaintiff is ready and willing to make such payment in order to protect its security under its mortgage hereinbefore mentioned, and if such *demand and levy should* be made upon the City of Seattle and its Street railway property the City will pay its share of such taxes with interest up to date in accordance with the contract between the City and the Company, but the City of Seattle, the County of King and W. W. Shields as County Treasurer and Matt Starwich as County Sheriff and other officials of the City of Seattle and County of King are acting in concert and confederation to compel the payment of all of such taxes out of the property covered by the plaintiff's mortgage and unless restrained by order of court will accomplish their unlawful scheme.

10. The levy upon the property covered by the plaintiff's mortgage and the notice of sale of the property covered by the plaintiff's mortgage has created and is continuing to create a cloud upon the mortgage security of the plaintiff and unless such levy be released and the notices of the sale removed and unless the defendants be enjoined from selling such property or any part thereof, and unless the City of Seattle be compelled to pay the portion of such taxes in accordance with its contract between the City and the Company, the plaintiff will suffer great and irreparable loss and damage and it has no adequate remedy at law. The property of the Company upon which the plaintiff's mortgage is a lien is used by the company in carrying on its business as a public service company serving many thousands of people with light and power, and the security of the plaintiff's mortgage will be irreparably injured and damaged if such [fol. 24] property or any part thereof be sold.

Forasmuch as the plaintiff can have no adequate relief except in this court and to the end therefore that the defendants may, if they can, show why the plaintiff should not have the relief herein prayed and make a full disclosure and discovery of all the matters aforesaid according to the best and utmost of their knowledge, remembrance, information and belief, and full, true, direct and perfect answer make to the matters in this bill of complaint, hereinbefore stated, but not under oath, an answer under oath being hereby expressly waived, the plaintiff prays:

1. That a temporary injunction be issued restraining the defendants, the County of King, W. W. Shields as County Treasurer, Matt Starwich as County Sheriff and all officers and agents of the County of King and of the City of Seattle from in any manner whatsoever carrying into effect their agreement to seize and sell and from selling any of the property described in the plaintiff's mortgage and from continuing the seizure of such property and advertising the sale of such property.

2. That the defendant Matt Starwich as such County Sheriff be enjoined during the pendency of the above entitled cause from levying upon and from continuing to levy upon any of the property

covered by the plaintiff's mortgage and from selling and from offering to sell any of the property covered by the plaintiff's mortgage to satisfy the taxes hereinbefore mentioned or any part thereof, and from posting any notice of the sale thereof to satisfy such taxes or any *part thereof*.

3. That the defendant Matt Starwich be required to resort for the satisfaction of such taxes to the street railway property of the City of Seattle upon which such taxes have been decreed to be specific [fol. 25] liens. That the City of Seattle pay to Matt Starwich as Sheriff of King County or to W. W. Shields as Treasurer of such County its share of such taxes in accordance with its contract with the company, or that such City pay to Matt Starwich as such County Sheriff or W. W. Shields as County Treasurer the state taxes with interest thereon constituting a lien upon the street railway property sold by the Company to the City, the County tax with interest thereon, also a lien upon such property, and the School District tax with interest thereon, constituting a lien upon such property, and that in the event of the plaintiff paying such taxes or any portion of the City tax upon the street railway property or upon the property levied upon by the Sheriff since the institution of the above entitled suit the plaintiff be subrogated to the lien of such taxes and that the City pay to the plaintiff the amount which the plaintiff may so pay.

4. That upon the final hearing and determination of this cause a permanent injunction be decreed giving the plaintiff the same relief herein prayed to be given by the temporary injunction.

5. May it please Your Honors to grant unto the plaintiff not only a writ of injunction conformable to the prayer of the original bill, but also of this bill, and also a writ of subpœna of the United States directed to the City of Seattle, the County of King, W. W. Shields as Treasurer of King County and Matt Starwich as Sheriff of King County, commanding them and each of them on a day certain to appear and answer unto this supplemental bill of complaint and to obey and perform such further decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience, and that the plaintiff be allowed to recover its costs [fol. 26] and disbursements of this suit.

Old Colony Trust Company as Trustee, by James B. Howe,
Its Solicitor.

[fol. 26½] Sworn to by James B. Howe; jurat omitted in printing.

[File endorsement omitted.]

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed May 31, 1924

Comes now The City of Seattle, one of the aforesaid defendants, and moves the court to dismiss the Bill of Complaint filed in this cause upon the following grounds:

1. That the bill does not state any matter of equity entitling plaintiff to the relief prayed for nor are the facts as stated sufficient to entitle plaintiff to any relief against the aforesaid defendant The City of Seattle.

2. That upon the face of the bill it appears that the court has no jurisdiction of the subject matter of said action.

3. That upon the face of the bill it appears that plaintiff has a plain, adequate and complete remedy at law.

4. That it appears upon the face of the bill that there is a misjoinder of parties defendant, in this: That the City of Seattle, the [fol. 28] aforesaid defendant, is neither a proper or necessary party to the action.

5. That it appears from the face of said bill of complaint that the same is multifarious; that causes of action are joined therein in which all of said defendants above mentioned are in no way interested; that by joining the causes of action as therein contained, and which are independent of each other, the proceedings will be unnecessarily intricate and prolix and the defendant The City of Seattle above named will be put to unnecessary costs in matters in which it is in no way related or concerned.

Wherefore, the aforesaid defendant The City of Seattle prays the judgment of the court whether it shall be compelled to answer further, and prays to be dismissed with its costs in this behalf incurred.

Thomas J. L. Kennedy, Corporation Counsel; Geo. A. Meagher, Assistant; Edwin C. Ewing, Assistant; Arthur R. Griffin, Assistant, Solicitors for Defendant The City of Seattle.

To the above-named Plaintiff, and to James B. Howe, Hugh A. Tait, and E. L. Kreider its solicitors:

Please take notice: That the foregoing motion to dismiss will be presented to the above entitled court for hearing on the 2nd day of June, 1924, at 11:00 o'clock in the morning, or as soon [fol. 29] thereafter as counsel can be heard.

Thomas J. L. Kennedy, Corporation Counsel; Geo. A. Meagher, Assistant; Edwin C. Ewing, Assistant; Arthur R. Griffin, Assistant, Solicitors for Defendant The City of Seattle.

Service of the within Motion to Dismiss by delivery of a copy to the undersigned is hereby acknowledged this 31st day of May, 1924. James B. Howe, Hugh A. Tait, Edgar L. Crider, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 30] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed May 28, 1924

Come now King County, Washington, W. W. Shields, as Treasurer of King County, and Matt Starwich, as Sheriff of King County, defendants above named, and move the Court to dismiss the Bill of Complaint filed in this cause upon the following grounds:

I

That the Bill does not state any matter of equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against these defendants or either of them.

II

That it appears from the face of said Bill that plaintiff has a plain, complete and adequate remedy at law and that there is no ground for the interposition of a court of equity.

III

That it appears from the face of said Bill that the court has no jurisdiction of the subject matter of said action.

[fol. 31]

IV

That there is a misjoinder of parties defendant herein in that The City of Seattle is joined as a party defendant.

V

That it appears from the face of said Bill that the same is exhibited against these defendants above named and The City of Seattle for several distinct matters and causes of action, in some of which, as appears by the Bill, these defendants above mentioned are in no way interested, that by thus joining the causes of action as therein contained, which are independent of each other, the proceedings will be unnecessarily intricate and prolix, and these defendants above named will be put to unnecessary costs in matters which in no way relate to or concern them.

Wherefore, these defendants pray the judgment of the court whether they shall be compelled to answer further, and pray to be dismissed with their costs in this behalf incurred.

Malcolm Douglas, Howard A. Hanson, Solicitors for Defendants County of King, W. W. Shields, as Treasurer of King County, and Matt Starwich, as Sheriff of King County.

To the above named plaintiff and to James B. Howe, Hugh A. Tait, and E. L. Crider, its solicitors:

Please take notice that the foregoing motion to dismiss will be presented to the above entitled court for hearing on the 23rd day of June, 1924, at 10:00 o'clock in the morning or as soon thereafter as counsel can be heard.

Dated May 28, 1924.

Malcolm Douglas, Howard A. Hanson, Solicitors for Defendants County of King, W. W. Shields, as Treasurer of King County, and Matt Starwich, as Sheriff of King County.

[File endorsement omitted.]

[fol. 31[1]] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS AMENDED BILL OF COMPLAINT—Filed June 2, 1924

Come now King County, Washington, W. W. Shields, as Treasurer of King County, and Matt Starwich, as Sheriff of King County, defendants above named, and move the court to dismiss the Amended Bill of Complaint filed in this cause upon the following grounds:

I

That the Amended Bill does not state any matter of equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against these defendants or either of them.

II

That it appears from the face of said Amended Bill that plaintiff has a plain, complete and adequate remedy at law and that there is no ground for the interposition of a court of equity.

III

That it appears from the face of said Amended Bill that the court has no jurisdiction of the subject matter of said action.

IV

That there is a misjoinder of parties defendant herein in that the City of Seattle is joined as a party defendant.

[fol. 31½]

V

That it appears from the face of said Amended Bill that the same is exhibited against these defendants above named and The City of Seattle for several distinct matters and causes of action, in some of which, as appears by the Amended Bill, these defendants above mentioned are in no way interested, that by thus joining the causes of action as therein contained, which are independent of each other, the proceedings will be unnecessarily intricate and prolix, and these defendants above named will be put to unnecessary costs in matters which in no way relate to or concern them.

Wherefore these defendants pray the judgment of the court whether they shall be compelled to answer further, and pray to be dismissed with their costs in this behalf incurred.

Malcolm Douglas, Howard A. Hanson, Solicitors for Defendants County of King, W. W. Shields, as Treasurer of King County, and Matt Starwich, as Sheriff of King County.

To the above named plaintiff and to James B. Howe, Hugh A. Tait, and E. L. Crider, its solicitors:

Please take notice that the foregoing motion to dismiss will be presented to the above entitled court for hearing on the 9th day of June, 1924, at 10.00 o'clock in the morning or as soon thereafter as counsel can be heard.

Malcolm Douglas, Howard A. Hanson, Solicitors for Defendants County of King, W. W. Shields, as Treasurer of King County, and Matt Starwich, as Sheriff of King County.

Dated June 2, 1924.

Due service of the within Motion to Dismiss Supplemental Bill of Complaint acknowledged and receipt of copy thereof admitted this 2nd day of June, 1924.

James B. Howe, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ON MOTION TO DISMISS—Filed June 5, 1924

Before Bourquin, Neterer, and Cushman, District Judges

CUSHMAN, D. J.:

The essence of the relief asked, is that the property covered by complainant's mortgage be not taken in the payment of a tax. All of the tax is valid; it is one tax as it touches this property, though levied for more than one purpose; part, if not all of it, is for the state.

Under the 11th amendment the court has no jurisdiction if the state is a party, or its right or interest, in money or a fund, are to be determined. The court cannot determine that the state is preferred in a fund unless it also has power to decide that it has no preference. A state's power to tax involves the power to destroy; the authority that can stay the state's hand in the collection of a valid tax can destroy the state. This court may not assume that power. The power company's property is or is not subject to all of this tax; if sold for the state's portion it may be freed of the remaining tax. The court may not decree that the state should only sell the property to obtain its portion of the tax, leaving the property subject to a lien for the remainder of the tax; for to so limit or condition the state's sale would be determining the states right, and under the 11th amendment this the court may not do.

The amended and supplemental bill *bill* be dismissed for want of jurisdiction.

[File endorsement omitted.]

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT—Filed June 26, 1924

This cause having come on to be heard at this term upon the motions of defendants County of King, W. W. Shields, as Treasurer of King County, and Matt Starwich, as Sheriff of King County, to dismiss the bill of complaint and the amended or supplemental bill of complaint herein, and upon the motion of defendant, the City of Seattle, to dismiss said bill and amended or supplemental bill, and after argument of counsel the court took said motions under advisement and thereafter, being fully advised in the premises, announced the decision of the court in writing, granting said motions to dis-

miss, and each of them, and filed the same with the Clerk of the Court, at which time solicitors and counsel for plaintiff in open court applied for and were granted leave of court until June 7, 1924, to file an amended or supplemental bill of complaint herein, and thereafter, on June 7, 1924, solicitors and counsel for plaintiff announced in open court that no amended or supplemental bill of complaint would be tendered or filed on behalf of said plaintiff, Old Colony [fol. 34] Trust Company, Trustee, and that said plaintiff refused to plead further, and thereupon the defendants, and each of them, by their respective counsel, moved the court orally for the dismissal of the cause of action herein, and the court having heard the arguments of respective counsel, and being fully advised in the premises,

It is ordered, adjudged and decreed that the motions of defendants County of King, W. W. Shields, as Treasurer of King County, and Matt Starwich, as Sheriff of King County, and of defendant The City of Seattle, to dismiss plaintiff's bill of complaint and amended or supplemental bill of complaint herein be and each of them hereby is granted.

It is ordered, adjudged and decreed that the motions of defendfendants, and each of them, asking for the dismissal of the cause of action herein, be and the same is hereby granted without prejudice, upon the ground that the court is without jurisdiction as a federal court.

Done in open court this 26th day of June, 1924.

Edward E. Cushman, United States District Judge.

Plaintiff excepts; exception allowed.

Edward E. Cushman, Judge.

[File endorsement omitted.]

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGE'S CERTIFICATE—Filed Sept. 15, 1924

Be it remembered, That during the present term of Court this cause came on to be heard upon the motions of the defendants to dismiss the above entitled suit on the ground that the District Court of the United States for the Western District of Washington, Northern Division, had no jurisdiction over the subject matter of the suit. The Court upon due consideration of said motions and after hearing the arguments of Counsel sustained the same on the sole ground that the Court as a Federal Court was without jurisdiction of the suit because the Eleventh Amendment to the Constitution of the United States prohibited the Court from entertaining such suit or exercising any jurisdiction therein. The Court on the 26th day of

June, 1924, accordingly directed and caused to be entered herein a decree dismissing the suit without prejudice and solely for want of jurisdiction in the District Court as a Federal Court to entertain or exercise jurisdiction herein, and upon no other ground. On motion of plaintiff for the purpose of a direct appeal to the Supreme Court of the United States upon the question of the jurisdiction of the [fol. 36] District Court this certificate is made and granted and the question of the jurisdiction of the suit by the District Court as a Federal Court and the correctness of the ruling and decree of the District Court that as a Federal Court it was and is without jurisdiction to entertain the suit are hereby certified to the Supreme Court of the United States for decision upon such appeal.

It is further certified that the matter in controversy herein as shown by the record exceeds in value Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

Dated this 15th day of September, 1924.

Edward E. Cushman, Judge of the United States District Court for the Western District of Washington.

[File endorsement omitted.]

[fol. 37] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL—Filed Sept. 8, 1924

The above-named plaintiff, Old Colony Trust Company, as Trustee, conceiving itself aggrieved by the final decree entered in the above entitled cause, on the 26th day of June, 1924, sustaining the motion of the defendants to dismiss the above entitled suit for want of jurisdiction and dismissing the above entitled suit for want of jurisdiction in the Court as a Federal Court, appeals from said final decree to the Supreme Court of the United States upon the sole ground that the District Court of the United States for the Western District of Washington, Northern Division, erred in holding that as a Federal Court it had no jurisdiction of the above entitled suit, and for that reason, and for that reason only, dismissed the above entitled suit, and Old Colony Trust Company, as Trustee, prays that this its appeal from said final decree to the Supreme Court of the United States be allowed, and that the question of the jurisdiction of said District Court as a Federal Court be certified for decision to the Supreme Court of the United States, and that a transcript of the record and proceedings and papers upon which said final decree was [fol. 38] made, duly authenticated, may be sent to the Supreme Court of the United States. The said Old Colony Trust Company, as Trustee, plaintiff and appellant, has filed herein its assignment of errors, setting up separately and particularly each error asserted and

intended to be urged in the Supreme Court of the United States upon said appeal.

And your petitioner will ever pray, etc.

Old Colony Trust Company, Trustee, Appellant, by James B. Howe, Hugh A. Tait, Edgar L. Crider, Its Solicitors.

Appeal allowed from the final decree of this Court dismissing the above entitled suit upon the sole ground that the Court was without jurisdiction as a Federal Court to entertain the suit, being forbidden so to do by the Eleventh Amendment to the Constitution of the United States, and the jurisdiction of the Court as a Federal Court to hear and determine the cause is hereby certified to the Supreme Court of the United States for decision.

Edward E. Cushman, Judge of the District Court of the United States for Western District of Washington.

[File endorsement omitted.]

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Sept. 8, 1924

Now comes Old Colony Trust Company, as Trustee, plaintiff in the above entitled suit, and files the following assignment of errors upon which it will rely on its appeal from the decree entered in the above entitled suit on the 26th day of June, 1924, dismissing the above entitled suit and the bill of complaint and amended and supplemental bill of complaint therein for want of jurisdiction in the Court as a Federal Court to entertain such suit.

I

The United States District Court for the Western District of Washington, Northern Division, erred in decreeing, and the final decree of such Court entered on the 25th day of June, 1924, is erroneous in decreeing that such District Court by reason of the Eleventh Amendment to the Constitution of the United States was without jurisdiction as a Federal Court to entertain such suit, and such District Court erred in dismissing the above entitled suit and the causes of action therein set forth on the ground that such Court was without jurisdiction as a Federal Court to entertain such suit and the causes of action therein set forth.

[fol. 40]

II

The District Court erred in holding that the State of Washington was either a party to the above entitled suit or interested in such suit and that for that reason the Eleventh Amendment to the Constitution of the United States prohibited such Court from entertaining such jurisdiction in the above entitled suit.

III

The District Court erred in holding that such Court was forbidden by the Eleventh Amendment to the Constitution of the United States to entertain jurisdiction in the above entitled suit as a Federal Court as against the City of Seattle, the County of King and the City and County officials individually made parties defendant in the above entitled suit.

IV

The District Court erred in sustaining the motions of the defendants to dismiss the above entitled suit for want of jurisdiction and in dismissing the above entitled suit for want of jurisdiction in such Court as a Federal Court.

Wherefore, the plaintiff prays that the District Court certify to the Supreme Court of the United States the question of the jurisdiction of the District Court as a Federal Court to entertain jurisdiction of the above entitled suit, and that the District Court make a certificate that by its final decree in the above entitled suit it dismissed the above entitled suit upon the sole ground that it was without jurisdiction as a Federal Court to entertain such suit, being forbidden to entertain such jurisdiction by the Eleventh Amendment to the Constitution of the United States.

[fol. 41] Wherefore, in order that the foregoing assignment of errors may be and appear of record, the plaintiff presents the same to the Court, and prays that such disposition be made thereof as is in accordance with the law and the statutes of the United States in such cases made and provided; and plaintiff prays that the decree of dismissal made and entered on the sole ground of want of jurisdiction of such Court as a Federal Court be reversed, and that a decree in favor of the plaintiff be entered by the Supreme Court of the United States.

James B. Howe, Hugh A. Tait, Edgar L. Crider, Solicitors for Plaintiff.

[File endorsement omitted.]

[fol. 42] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed Sept. 15, 1924

On motion of James B. Howe, Hugh A. Tait and Edgar L. Crider, solicitors for the above named plaintiff, and upon the filing and presentation of a petition for the allowance of its appeal to the Supreme Court of the United States from the final decree of the District Court entered herein on the 26th day of June, 1924, and the plaintiff having filed an assignment of errors herein in the

office of the Clerk of the District Court of the United States for the Western District of Washington prior to the presentation of its petition for the allowance of such appeal alleging that the District Court erred in dismissing the above entitled suit for want of jurisdiction in said District Court as a Federal Court to entertain the same and on that ground alone—

It is ordered that the appeal prayed for be and the same is hereby allowed from said final decree to the Supreme Court of the United States to determine only the question of the jurisdiction of the District Court as a Federal Court to entertain the suit because the jurisdiction of the District Court as a Federal Court was in issue, and the District Court dismissed the above entitled suit on the sole [fol. 43] ground that it was without jurisdiction as a Federal Court of the suit because its exercise of such jurisdiction was prohibited by the Eleventh Amendment to the Constitution of the United States. The question of the jurisdiction of the suit by the District Court as a Federal Court is hereby certified to the Supreme Court of the United States for decision.

It is further ordered that a certified transcript of the record and proceedings herein be forthwith transmitted to the Supreme Court of the United States.

It is further ordered that the plaintiff file an appeal bond in the sum of One Thousand dollars ($1,000.00).

Dated this 15th day of September, 1924.

Edward E. Cushman, Judge of the District Court of the United States for Western District of Washington.

[File endorsement omitted.]

[fols. 44-46] Bond on Appeal for $1,000—Approved and filed Sept. 15, 1924; omitted in printing

[fol. 47] In United States District Court

[Title omitted]

Præcipe for Transcript of Record—Filed Sept. 20, 1924

To the Clerk of the above-entitled Court:

You will please prepare and duly authenticate the transcript of record in the above-entitled cause on the appeal of the above named plaintiff heretofore allowed to the Supreme Court of the United States, and transmit such transcript to the Clerk of the Supreme Court of the United States at Washington, District of Columbia, within sixty (60) days from the 15th day of September, 1924; such transcript of record to consist of the following:

1. Original bill of complaint.
2. Subpoena with proof of service.

3. Motion for leave to file supplemental bill.
4. Order allowing amended and supplemental bill.
5. Amended and supplemental bill.
6. Motion of City of Seattle to dismiss and motion of other defendants to dismiss.
7. Opinion of Court denying temporary injunction and granting motion to dismiss for want of jurisdiction.
8. Decree dismissing suit for want of jurisdiction in the Court as a Federal Court and without prejudice.
[fol. 48] 9. Certificate that suit was dismissed for want of jurisdiction as a Federal Court.
10. Plaintiff's petition for allowance of appeal.
11. Assignment of errors.
12. Order allowing appeal.
13. Bond on appeal and order approving bond.
14. Original citation on appeal with acknowledgment of service.
15. This praecipe & notice thereon.

James B. Howe, Hugh A. Tait, E. L. Crider, Solicitors for Plaintiff-Appellant.

[File endorsement omitted.]

[fol. 49] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF PRAECIPE FOR TRANSCRIPT OF RECORD

The undersigned, Solicitors for the above-named plaintiff-appellant, have prepared a praecipe for the record on appeal from the decree of the above-entitled Court entered on the 25th day of June, 1924, to the Supreme Court of the United States, and in such praecipe have designated the portions of the record to be transmitted to the Supreme Court of the United States by the Clerk of the District Court in the above-entitled cause, a copy of which praecipe is herewith served upon you, and the original of such praecipe will be forthwith filed with the Clerk of said District Court.

James B. Howe, Hugh A. Tait, E. L. Crider, Solicitors for Plaintiff-Appellant.

[fol. 50] The undersigned hereby acknowledge receipt of the foregoing notice and of the copy of the praecipe therein mentioned, this 18th day of September, 1924.

Thomas J. L. Kennedy, Geo. A. Meagher, Solicitors for the City of Seattle. Malcolm Douglas, Howard A. Hanson, Solicitors for King County, W. W. Shields, as Treasurer of King County, and Matt Starwich, as Sheriff of King County.

[File endorsement omitted.]

[fol. 51] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 50, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington, to the Supreme Court of the United States.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellants for making record, certificate or return to the Supreme Court of the United States in the above entitled cause, to wit:

[fol. 52] Clerk's fees (Sec. 828 R. S. U. S.) for making record, certificate or return, 118 folios at 15c..... $17.70
Certificate of Clerk to transcript of record, 1 folios at 15c.... .60
Seal to said Certificate..... .20

I further certify that the above cost for preparing and certifying record on appeal, amounting to $18.50, has been paid to me by solicitors for appellant.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

In witness whereof I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 28th day of October, 1924.

F. M. Harshberger, Clerk United States District Court, Western District of Washington. (Seal of the United States District Court, Western District of Washington.)

[fols. 53 & 54] CITATION—In usual form: omitted in printing

[fols. a-2] **Supplemental Transcript of Record of the County of King**

In United States District Court for the Western District of Washington, Northern Division

In Equity

No. 403-E

Old Colony Trust Company, Trustee, Plaintiff,

vs.

The City of Seattle, The County of King, W. W. Shields, as Treasurer of King County, and Matt Starwich, as Sheriff of King County, Defendants.

Motion for Temporary Injunction

1. Now comes the above named plaintiff, and upon the sworn bill of complaint in the above entitled suit filed on the 22nd day of May, 1924, in the above entitled court, moves the Court for a temporary injunction against the defendants, and each of them, restraining the defendants and each of them from levying upon, seizing or in any manner interfering with any of the property described in the deed of trust, or subject to such deed of trust, or any of the property of Puget Sound Power & Light Company in King County, to satisfy any portion of the taxes for the year 1919 levied upon the street railway property conveyed by Puget Sound Power & Light Company to the City of Seattle on the 31st day of March, 1919, which said deed of trust was recorded in the office of the auditor of King County, State of Washington, in Volume 822 of Mortgages at page one, and filed as a chattel mortgage in the office of such Auditor under file number 68307, and filed on the 23rd day of May, 1921, with the City Comptroller and ex officio city clerk of the City of Seattle, Washington.

[fol. 3] 2. That such temporary injunction remain in force until the above entitled suit be finally heard and determined, and that upon the final hearing and determination the defendants and each of them be perpetually restrained and enjoined from seizing or in any manner interfering with any of such property until they have proceeded to collect such taxes out of the street railway property in the possession of the City of Seattle, described in such deed hereinbefore mentioned, which street railway property is readily available for the satisfaction of such taxes and is unencumbered by mortgage.

3. That the plaintiff have such other and further relief in the premises as to the Court may seem just.

This motion is also based upon such affidavits as may be filed by the plaintiff prior to the hearing of this motion, as well as upon the sworn bill of complaint hereinbefore mentioned.

James B. Howe, Hugh A. Tait, E. L. Crider, Solicitors for Plaintiff.

Return on Service of Writ

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify and return that I served the annexed notice of hearing of motion for temporary injunction on the therein-named Edwin J. Brown as mayor of the City of Seattle by handing to and leaving a true and correct copy thereof with Edwin J. Brown personally at Seattle, in said District, on the twenty-fourth day of May, A. D. 1924.

E. B. Benn, U. S. Marshal, by Joseph Knizek, Deputy.

Return on Service of Writ

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify and return that I served the annexed notice of hearing of motion for temporary injunction on the therein-named William A. Gaines, as chairman of the board of county commissioners for King County, by handing to and leaving a true and correct copy thereof with William A. Gaines personally at Seattle, in said District, on the twenty-fourth day of May, A. D. 1924.

E. B. Benn, U. S. Marshal, by Joseph Knizek, Deputy.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, May 24, 1924. F. M. Harshberger, Clerk, by S. E. Leitch, Deputy.

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HOWARD A. HANSON—Filed May 28, 1924

STATE OF WASHINGTON,
County of King, ss:

Howard A. Hanson, being first duly sworn on oath deposes and says: That since the second Monday in January, 1919, he has been and now is a duly appointed, qualified and acting Deputy Prosecuting Attorney for King County; that he has read the affidavit of James B. Howe, solicitor for plaintiff herein in support of plaintiff's motion for a temporary injunction herein and by way of answer

thereto states, as follows: That as such Deputy Prosecuting Attorney he has had immediate charge under the direction of the Prosecuting Attorney of King County of the litigation to determine the legality of the tax referred to in plaintiff's complaint both in the Superior Court of the State of Washington for King County, in the State Supreme Court, and in the Supreme Court of the United States; that the powers and duties of public officials in relation to the assessment, levy and collection of taxes are prescribed by law; that no officers, agents or employes of King County have any authority or control [fol. 5] with respect to public taxes, save and except in accordance with powers and duties imposed upon certain public officials by statute; that the issue in such case was to determine the legality of such taxes; that in such litigation counsel for Puget Sound Power & Light Company sought to involve King County and its taxing officials in the contract between said company and The City of Seattle, referred to in plaintiff's complaint and in the affidavit of said James B. Howe; that affiant believed and counseled in such cause that neither King County nor any of its taxing officials was in any wise bound by such contract, and that the sole duty of the County and its taxing officials was to determine the validity of such taxes and if deemed to be legal to proceed with the collection thereof and, if necessary, the enforcement of the collection of such taxes as provided by law; that affiant has read the affidavits of W. W. Shields as County Treasurer of King County, Matt Starwich, as Sheriff of King County, A. Hutcheson, as Under Sheriff and Deputy Sheriff of King County, and Samuel H. Chase, as Assessor of King County herein filed in opposition to the motion of plaintiff herein for a temporary injunction and that substantially all of the facts therein set forth are within the personal knowledge of affiant, except as to the conference between Under Sheriff Hutcheson and A. W. Leonard and James B. Howe on the day that distraint was made by the Sheriff at which conference affiant was not present; that the matters set forth in said affidavits, so within the personal knowledge of affiant, are true and are made a part of this affidavit by reference; that the taxes herein involved are personal property taxes; that the same became a lien on the 15th day of March, 1919, upon the specific per- [fol. 6] sonal property assessed and upon all the personal property of the person assessed, to-wit, the Puget Sound Traction, Light & Power Company, now the Puget Sound Power & Light Company; that the lien of said taxes is paramount and superior to any and all other liens whatsoever; that such taxes and the whole thereof in the principal sum of Four Hundred One Thousand Seventeen Dollars and Seventy-Six Cents ($401,017.76) with interest at the rate of fifteen (15) per cent per annum from March 15, 1920, are due and owing from the Puget Sound Power & Light Company to the Treasurer of King County; that in proceeding with the collection and the enforcement of the collection of such taxes the Treasurer of King County and the Sheriff of King County are acting under and by virtue of the provisions of the laws of the State of Washington; that said taxes and each and every portion thereof have heretofore been adjudged and held to be valid legal taxes in the full principal

sum of Four Hundred One Thousand Seventeen Dollars and Seventy-Six Cents ($401,017.76); that said taxes in such sum with interest as hereinabove mentioned are due and owing to the Treasurer of King County by said Puget Sound Power & Light Company and it is the duty of said Treasurer to collect such taxes and the whole thereof with interest from said Company and it was the duty of the Treasurer of King County upon the failure, neglect and refusal of said Company to pay such taxes and the whole thereof, to direct the Sheriff of King County without demand or notice to distrain sufficient goods and chattels belonging to said Company charged with such taxes, to pay the same with such interest from the 15th day of March, 1920, together with all accruing costs, and that upon receipt of such notice from said County Treasurer, the Sheriff proceeded in accordance therewith to distrain sufficient goods and chattels of said Company to [fol. 7] pay such taxes with interest and costs; that the sole purpose of King County and its taxing officers and of affiant as Deputy Prosecuting Attorney for King County is to collect such taxes and the whole thereof and to enforce such collection if necessary, as provided by law.

Howard A. Hanson.

Subscribed and sworn to before me this 27th day of May, 1924. Malcolm Douglas, Notary Public in and for the State of Washington, residing at Seattle. (Notarial Seal.)

[File endorsement omitted.]

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF MATT STARWICH—Filed May 28, 1924

STATE OF WASHINGTON,
County of King, ss:

Matt Starwich, being first duly sworn on oath deposes and says: That for the two year term commencing on the second Monday in January, 1921, I was the duly elected, qualified and acting Sheriff of King County, Washington; that I was duly reelected to the office of such Sheriff for the four year term commencing on the second Monday of January, 1923, and since said date have been and now am the duly elected, qualified and acting Sheriff of such County; that on the 20th day of May, 1924, W. W. Shields, Treasurer of King County, Washington, directed affiant as Sheriff of such County to distrain sufficient goods or chattles belonging to the plaintiff herein to pay the personal property tax for the year 1919 of the plaintiff herein in the principal sum of Four Hundred One Thousand Seventeen Dollars and Seventy-Six Cents ($401,017.76) against the

street railway line with interest at the rate of fifteen (15) per cent per annum from the 15th day of March, 1920, together with all [fol. 9] accruing costs, such tax with interest to May 20, 1924, amounting to Six Hundred Fifty Two Thousand Four Hundred and Ninety Six ($652,496.00) Dollars; that in compliance therewith and in the manner prescribed by law, affiant as such Sheriff on the 23rd day of May, 1924, distrained personal property being the property of Puget Sound Power & Light Company as specified in Exhibit "A" attached to the said affidavit of James B. Howe herein and fixed the 10th day of June, 1924, at the Court-House door, Jefferson Street entrance in the City of Seattle, King County, Washington, commencing at 10.00 o'clock A. M. on said 10th day of June, 1924, as the time and place for the sale by him as such Sheriff of the personal property described in said Exhibit "A", at public auction to the highest and best bidder for cash to satisfy said tax with interest and costs.

That affiant as such Sheriff is an independent public officer whose powers and duties are prescribed by the laws of the State of Washington; that in the enforcement of the collection of such taxes with interest, affiant has acted under and pursuant to the powers and duties imposed upon him as such Sheriff by the laws of the State of Washington; that affiant has not as such Sheriff nor individually has he entered into any combination, agreement, understanding or collusion, express or implied with The City of Seattle, or any of its officers or agents with relation to the enforcement of the collection of the above mentioned taxes, or with regard to the discharge of his official duties in the enforcement of the collection of such taxes; that the contract between the City of Seattle and Puget Sound Power & Light Company referred to in the affidavit of said James B. Howe, does not bind or limit affiant as such Sheriff in the discharge of his powers and duties in the enforcement of the collection of such taxes; that such taxes in the full sum of Four Hundred One Thousand [fol. 10] Seventeen Dollars and Seventy-six Cents ($401,017.76) with interest thereon at the rate of fifteen (15) per cent per annum from March 15, 1920, are due and owing from Puget Sound Power & Light Company to the Treasurer of King County; that affiant as such Sheriff has not combined with the City and its officers or agents or with any public official to oppress and coerce Puget Sound Power & Light Company, but affiant has and is acting in the discharge of his powers and duties as such Sheriff to enforce the collection of such taxes as provided by law.

Matt Starwich.

Subscribed and sworn to before me this 27th day of May, 1924. Malcolm Douglas, Notary Public in and for the State of Washington, residing at Seattle. (Notarial Seal.)

[File endorsement omitted.]

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF W. W. SHIELDS—Filed May 28, 1924

STATE OF WASHINGTON,
County of King, ss:

W. W. Shields, being first duly sworn on oath deposes and says: I am and since the second Monday in January, 1923, have been the duly elected, qualified and acting Treasurer of King County, Washington; I have read the affidavit of James B. Howe in support of the motion of plaintiff herein for a temporary injunction against the defendants and each of them; that on the 15th day of March, 1919, a personal property assessment was levied by the State Tax Commissioner as provided by law upon the operating property of the street railway system in the City of Seattle owned by the plaintiff herein, which assessment became a lien upon the said 15th day of March, 1919, against the property so assessed and against all of the personal property of plaintiff herein; that such assessment so made was duly certified by the State Tax Commissioner to the Assessor of King County, Washington, and by him entered upon the assessment rolls for the year 1919 and thereafter the amount of taxes chargeable against plaintiff herein by reason of such assessment was levied and fixed in the total principal sum of Four Hun-[fol. 12] dred One Thousand Seventeen Dollars and Seventy-Six Cents ($401,017.76); that thereafter plaintiff therein commenced an action in the Superior Court of the State of Washington for King County, being Cause No. 139815, entitled "Puget Sound Traction, Light & Power Company, Plaintiff, vs. The City of Seattle, The County of King, Frank W. Hull, as Assessor of King County; Norman M. Wardall, as Auditor of King County, and William A. Gaines, as Treasurer of King County, Defendants," to adjudge that the levy of taxes upon said assessment was illegal and void and to restrain the defendants and each of them from taking any steps for the collection or the enforcement of any and all taxes levied upon such assessment; that upon the trial of said cause the said assessment was held and decreed to be valid and the taxes based thereon held and decreed to be legal and lawful and the said action was dismissed with prejudice; that thereafter plaintiff therein and The City of Seattle appealed from said decree to the Supreme Court of the State of Washington, which court in a departmental opinion on the 15th day of October, 1921, affirmed said decree and upon rehearing en banc of said departmental opinion on the 12th day of June, 1922, affirmed said decree and judgment; that thereafter plaintiff therein and The City of Seattle removed said cause by writs of error to the Supreme Court of the United States, which Court on the 18th day of February, 1924, rendered its decision therein granting the Motion of King County and its taxing officers to dis-

miss the writ of error of the City of Seattle and granting the motion of King County and its taxing officers to affirm the judgment against plaintiff therein; that thereafter plaintiff therein petitioned the Supreme Court of the United States for a rehearing of said cause, which petition was thereafter on the 7th day of April, 1924, denied; that thereafter the Clerk of the United States Supreme Court issued the remittitur of said Court in said cause in accordance with the [fol. 13] opinion of the court therein to the Clerk of the Supreme Court of the State of Washington, who upon filing the same in his court issued the remittitur of the Supreme Court of the State of Washington in said cause to the Clerk of the Superior Court of the State of Washington for King County, and the same was on the 26th day of April, 1924, filed in the above mentioned cause No. 139,815.

That upon the filing of said remittitur with the Clerk of the Superior Court as aforesaid, affiant as Treasurer of the County of King, State of Washington, proceeded to collect the taxes above mentioned with interest thereon from the delinquency thereof, namely: March 15, 1920, at the rate of fifteen (15) per cent per annum as provided by law; that plaintiff herein failed, neglected and refused to pay said taxes and thereafter on the 20th day of May, 1924, affiant as such Treasurer directed Matt Starwich as Sheriff of King County, Washington, to distrain sufficient goods and chattels belonging to the plaintiff herein as the person charged with such taxes to pay the same with interest at the rate of fifteen (15) per cent per annum from the 15th day of March, 1920, together with all accruing costs in the manner provided by law.

That affiant as Treasurer of defendant King County, is an independent public officer with powers and duties prescribed by law; that under the laws of the State of Washington the powers and duties relating to the collection of taxes are imposed upon the County Treasurers of the several counties in the State; that in answer to the said affidavit of James B. Howe, herein, affiant states that neither as such Treasurer nor individually has he entered into any combination, agreement, understanding or collusion express or implied with the City of Seattle, or any of its officers or agents with relation to the collection of the above mentioned taxes or with regard to the dis- [fol. 14] charge of his official duties in the collection of such taxes; that the contract between the City of Seattle and plaintiff therein referred to in the affidavit of said James B. Howe, does not bind or limit affiant as such Treasurer in the discharge of his powers and duties in the collection of such taxes; that such taxes in the full sum of Four Hundred One Thousand, Seventeen Dollars and Seventy-Six Cents, ($401,017.76) with interest thereon at the rate of fifteen (15) per cent per annum from March 15, 1920, are due and owing from said Puget Sound Power & Light Company to affiant as Treasurer of King County; that affiant as such Treasurer has not combined with the City and its officers or agents or with any public official to oppress and coerce said company, but affiant has and is acting in the discharge of his powers and duties as such Treasurer

to collect such taxes and to enforce their collection as provided by law.

W. W. Shields.

Subscribed and sworn to before me this 27th day of May, 1924. Malcolm Douglas, Notary Public in and for the State of Washington, residing at Seattle. (Seal.)

[File endorsement omitted.]

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF A. HUTCHESON—Filed May 28, 1924

STATE OF WASHINGTON,
County of King, ss:

A. Hutcheson, being first duly sworn on oath deposes and says: That for more than seven years last past he has been and now is a duly appointed, qualified and acting Under Sheriff and Deputy Sheriff of King County, Washington; that he has read the affidavit of Matt Starwich in answer to the affidavit of James B. Howe herein and that the facts set forth in such affidavit of Matt Starwich are true and affiant makes the same as part of this affidavit with the same force and effect as if set forth word for word herein; that by way of further answer to the affidavit of said James B. Howe herein, affiant states that acting under the direction of said Matt Starwich as Sheriff of King County, affiant as such Under Sheriff and Deputy Sheriff of said King County on the 23d day or May, 1924, by virtue of the notice of distraint served on the Sheriff of King County on May 20, 1924, by W. W. Shields, as Treasurer of such county as set forth in Exhibit "A" attached to the affidavit of said James B. [fol. 16] Howe, distrained sufficient goods and chattels belonging to Puget Sound Power & Light Company as the person charged with such taxes to pay the same with interest at the rate of fifteen (15) per cent per annum from the 15th day of March, 1920, together with all accruing costs and thereupon on said 23d day of May, 1924, proceeded to advertise the same by posting written notices in three public places in the County of King, State of Washington, one of which places was at the County Court-House, such notices stating the time and place where such property will be sold, all as more particularly appears in the notice of Sheriff's sale, being Exhibit "A," attached to the affidavit of said James B. Howe; that in addition thereto affiant posted in various places upon the property of said Puget Sound Power & Light Company additional notices of such sale at approximately twelve (12) different places; that in addition thereto affiant called at the executive offices of said corporation in the White-Henry-Stuart Building, in the City

of Seattle, Washington, and delivered a copy of said notice of sale, together with a copy of the Treasurer's notice of distraint aforesaid to A. W. Leonard, president of the Puget Sound Power & Light Company; that at such time said A. W. Leonard called James B. Howe, solicitor for plaintiff corporation, into his office and affiant then and there informed said A. W. Leonard and James B. Howe of the total amount of such taxes with interest and costs to date and stated that he would accept the same in full satisfaction of such taxes at that time in a lump sum, or that he would accept separate tenders at that time to the full aggregate of such total amount of taxes with interest and costs, but that under the law he had no power to accept any portion of such taxes less than said full amount; that neither plaintiff herein, nor said A. W. Leonard, as president of the Puget [fol. 17] Sound Power & Light Company, nor James B. Howe, as its solicitor, tender to affiant the full amount of such taxes as aforesaid or any part thereof; that the property seized and distrained by such sheriff as aforesaid is subject to the lien of such taxes and that the lien thereof is paramount and superior to any lien of mortgage claimed by the Old Colony Trust Company, Trustee, and that in all things herein the Sheriff has proceeded in accordance with the provisions of the statute in such cases made and provided.

That at the time of the service of the distraint as hereinabove stated, neither the Sheriff of King County nor affiant nor any other officer of King County or the County itself had been served with any copy of the Bill of Complaint herein and affiant and Matt Starwich as Sheriff of King County had no notice from this court that they or either of them were not authorized to proceed with the discharge of their duties as provided by law.

A. Hutcheson.

Subscribed and sworn to before me this 27th day of May, 1924. Malcolm Douglas, Notary Public in and for the State of Washington, residing at Seattle. (Notarial Seal.)

[File endorsement omitted.]

[fol. 18] In United States District Court

[Title omitted]

Affidavit of Samuel H. Chase—Filed May 28, 1924

State of Washington,
County of King, ss:

Samuel H. Chase, being first duly sworn on oath deposes and says: That from and after the second Monday in January, 1923, he has been and now is the duly elected, qualified and acting Assessor of King County, Washington; that prior thereto he was Chief Deputy and a Deputy in the office of the Assessor of King County, Washing-

ton, for more than fifteen years; that he has read the affidavit of James B. Howe in support of plaintiff's motion for a temporary injunction herein and by way of answer thereto states that neither as such County Assessor nor as Deputy County Assessor has affiant ever entered into any agreement, understanding, combination, or collusion, express or implied, with the City of Seattle, or any of its officers or agents with relation to the collection of the taxes referred to in the affidavit of said James B. Howe, or with regard to the discharge of his official duties as such Assessor or prior thereto as such Deputy Assessor in relation to the assessment or collection of such taxes, that [fol. 19] when the litigation concerning such taxes was pending in the Superior Court of the State of Washington for King County, he was present and assisted Howard A. Hanson, Deputy Prosecuting Attorney for King County throughout the preparation and trial of said cause; that no agreement or understanding was entered into between any representatives of King County and the City of Seattle as alleged in paragraph XVII of plaintiff's complaint, of which I have any knowledge.

Samuel H. Chase

Subscribed and sworn to before me this 27th day of May, 1924. Malcolm Douglas, Notary Public in and for the State of Washington, residing at Seattle. (Notarial Seal.)

[File endorsement omitted.]

[fol. 20] In United States District Court

[Title omitted]

Order Denying Motion for Interlocutory Injunction—Filed June 7, 1924

This cause having come on to be heard upon the motion of plaintiff for an interlocutory injunction and the court being fully advised in the premises, and having heard the argument of respective counsel, it is hereby

Ordered, adjudged, and decreed that the motion for an interlocutory injunction herein be and the same hereby is denied.

Dated this 7 day of June, 1924.

Geo. M. Bourquin, Jeremiah Neterer, United States District Judge.

[File endorsement omitted.]

[fol. 21] IN UNITED STATES DISTRICT COURT

[Title omitted]

COUNTY'S PRECIPE FOR TRANSCRIPT OF RECORD—Filed Sept. 29, 1924

To the Clerk of the above-entitled Court:

You will please prepare and duly authenticate as a part of the transcript of the record in the above entitled cause on the appeal of the above named plaintiff, heretofore allowed, to the Supreme Court of the United States, and transmit such additional transcript to the Clerk of the Supreme Court of the United States at Washington, District of Columbia, within sixty (60) days from the 15th day of September, 1924; such additional transcript of record to consist of the following:

2. Plaintiff's motion for temporary injunction.
3. Affidavit of Howard A. Hanson; without exhibit "A."
4. Affidavit of Matt Starwich.
5. Affidavit of W. W. Shields.
6. Affidavit of A. Hutcheson.
7. Affidavit of S. H. Chase.
8. Order denying motion for interlocutory injunction.
9. Transmit with the record printed copy of printed exhibit attached to affidavit of Howard A. Hanson.

Malcolm Douglas, Howard A. Hanson, Solicitors for Defendants, County of King, W. W. Shields, as Treasurer of King County, and Matt Starwich, as Sheriff of King Co.

Due service of the within Praecipe acknowledged and receipt of copy thereof admitted this — day of Sept., 1924.

James B. Howe, Hugh A. Tait, Edgar L. Crider, Atty. for Plff.

Copy of within received Sep. 29, 1924.

Thomas L. Kennedy, Attys for Defts., City of Seattle.

[File endorsement omitted.]

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from

1 to 21, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by præcipe of counsel for the appellee, County of King filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the supplemental record of the County of King, on appeal herein from the judgment of the said United States District Court for the Western District of Washington, to the Supreme Court of the United States.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellee, County of King, herein, for making supplemental record, certificate or return of said County of King, to the Supreme Court of the United States in the above entitled cause, to wit:

[fol. 23] Clerk's fees (Sec. 828 R. S. U. S.) for making supplemental record, certificate or return, 55 folios at 15c....	$8.25
Certificate of Clerk to Transcript of Record, 4 folios at 15c..	.60
Seal to said Certificate.....	.20

I hereby certify that the above cost for preparing and certifying said supplemental record, amounting to $9.05, has been paid to me by solicitors for appellee, County of King.

In witness whereof I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 3rd day of November, 1924.

F. M. Harshberger, Clerk United States District Court, Western District of Washington. (Seal of United States District Court, Western District of Washington.)

[fol. a-2] **Supplemental Transcript of Record of City of Seattle**

In United States District Court for the Western District of Washington, Northern Division

In Equity

No. 403-E

Old Colony Trust Company, Trustee, Plaintiff,

vs.

The City of Seattle, The County of King, W. W. Shields, as Treasurer of King County, and Matt W. Starwich, as Sheriff of King County, Defendants

Affidavit of Thomas J. L. Kennedy—Filed June 2, 1924

State of Washington,
County of King, ss:

Thomas J. L. Kennedy, being first duly sworn, on oath says: That he is the duly elected, qualified and acting Corporation Counsel of the City of Seattle, a municipal corporation and city of the first class, organized and existing under the laws of the State of Washington; that said city is named as one of the defendants in the above entitled cause; that affiant makes this affidavit in its behalf; that affiant has read the plaintiff's Bill of Complaint and affidavits in said cause and makes this affidavit in traversing the same; that the defendant city has made no lawful contract with the Puget Sound Power & Light Company whereby the city is obligated to pay the personal taxes of said company; that the proviso embodied in the contract contained in Ordinance No. 39069, relied upon by the plaintiff, was never submitted to the qualified voters for their approval; that the plan or system ordinance, No. 39025, relied upon by plaintiff, was never submitted to the qualified voters for their ap-[fol. 3] proval; that all of the personal taxes complained of by plaintiff arise out of the act of the State Tax Commissioner, over whom the City of Seattle had no control, and who assessed such taxes over the City's protest, as the plaintiff well knows; that in the matter of tax levies the City Council has no discretion or option concerning the property to which the city's levy shall attach, as the plaintiff well knows; that the City of Seattle has not "joined with the County in its efforts to compel payment" by the Puget Sound Power & Light Company of the company's personal taxes; that affiant knows of no combination, collusion or conspiracy between city and county officers designed to oppress and coerce the plaintiff, or at all, or for any purpose, and on information and belief alleges that the same does not exist; that neither the city, nor its officers, have any power or authority under the law to collect taxes, and are not charged with any power or discretion in respect to such collection, as plaintiff well

knows; that the only body authorized by law to fix the policy of the city, or to enter into a combination of said kind, and to speak for the city in the premises, is the City Council; that the only action taken by the "City" in respect to this controversy was taken in respect to the two communications of the Puget Sound Power & Light Company made to the city with a view to joint payment of the company's personal taxes; that certified copies of the proceedings of the City Council with respect thereto are hereunto attached and marked Exhibits "C" and "D," respectively; that the city did not refuse to pay a portion of the company's personal taxes but directed its Clerk to notify the company that it was without legal power to do so; that the City Council came to this conclusion by reason of an opinion of affiant, a copy of which is hereunto attached and marked Exhibit "B," which was furnished to Mr. E. L. Blaine, Chairman of the Finance Committee of the City Council upon his written request, [fol. 4] a copy of which is hereunto attached and marked Exhibit "A;" that a copy of the Asia decree, referred to in said opinion, is hereunto attached and marked Exhibit "E," all of which exhibits are by the references herein contained, hereby made a part of this affidavit, as though fully set forth herein.

Further affiant sayeth not.

Thomas J. L. Kennedy.

Subscribed and sworn to before me this 2nd day of June, 1924. R. B. McClinton, Notary Public in and for State of Washington, residing at Seattle. (Notarial Seal.)

[fol. 5] EXHIBIT "A" TO AFFIDAVIT OF THOMAS J. L. KENNEDY

"April 30, 1924.

Mr. T. J. L. Kennedy, Corporation Counsel.

DEAR SIR: We are in receipt of notice from the Puget Sound Power and Light Company that the remittitur from the Supreme Court of the United States has been received confirming the lien of the taxes levied by the County against the Puget Sound Power and Light Company when it still owned the railway system.

The provisions of Ordinance No. 39069 require the 'city' to pay its proportional part of the taxes for 1919.

In view of the provisions of each ordinance authorizing the issuance of bonds obligating the gross revenues from the system for the redemption of the bonds and the payment of interest thereon, can we legally divert such revenues to the payment of the tax?

The provisions of Ordinance No. 39069 seem to contemplate the payment of such sum from the general fund of the city. In view of the decree in the so-called 'Asia Case' can we legally use general fund money for this purpose?

If all phases of this question have not been covered by the above questions, will you kindly cover the same in your reply so that we may act in an orderly and legal manner in meeting this obligation?

Very respectfully, (E. L. Blaine) E. L. Blaine, Chairman Finance Committee."

[fol. 6] EXHIBIT "B" TO AFFIDAVIT OF THOMAS J. L. KENNEDY

May 9th, 1924.

Re Invalidity of Agreement to Pay P. S. T., L. & P. Co. St. Ry. Tax

Mr. E. L. Blaine, Chairman, Finance Committee, City Council, Seattle, Washington.

DEAR SIR: We are in receipt of your request for an opinion concerning payment of the taxes assessed against the local operating street railway property of the Puget Sound Traction, Light & Power Company on March 15th, 1919, just sixteen days prior to the sale of the said property to the City pursuant to Ordinances Nos. 39025 and 39069. We will hereinafter refer to said corporation as the "Company" and to said street railway system as the "Property." Your request arises by reason of the proviso contained in the purchase contract authorized by said Ordinance No. 39069, whereby the City Council sought to bind the City to pay a proportional part of the taxes levied against the Property for the year 1919, and by reason of a reservation in the deed and bill of sale furnished by the Company to the City on March 31st, 1919, seeking to impose upon the City the same obligation. Your request presents two questions:

(1) The agreement binding the City to pay such taxes having been undertaken as a general obligation, can the City's portion now be paid by the use of General Fund moneys in view of the decree in the "Asia case?"

(2) Assuming that the General Fund may not be used for such purpose, can the City now resort to the City Railway Fund to pay the tax, in view of outstanding bonds constituting obligations against the gross revenues?

Confirmatory of your conclusion that the payment of the taxes was undertaken as a general obligation, a short résumé of the history of the transaction is advisable.

Sometime in September, 1918, (about the 5th or 6th), an agreement was made between certain members of the City Council and the Mayor, on the one hand, and representatives of the Company, on the other, whereby it was arranged that the City should purchase the Property for $15,000,000 in utility revenue bonds. Numerous conferences were held between said groups representing the City and the Company during the days immediately following. About two weeks thereafter, the Mayor suggested an immediate transfer of

the Property and the issuance of the bonds therefor. This was opposed by Mr. Meier (who had in the meantime become Corporation Counsel), for the reason that there were millions of dollars of outstanding mortgage obligations which were liens against the Property. Mr. Meier pointed out to the Mayor, the City Council, and the representatives of the Company, in conference, that a taking over of the Property subject to such liens would constitute the incurring of a debt. To obviate this difficulty, the Company proposed a so-called "interim agreement," whereby the City was to take over the Property conditionally, with the right to return the same if the Company failed to secure satisfaction of the liens. This having been [fol. 7] opposed by Mr. Meier (on legal grounds), he was directed to prepare an ordinance authorizing an agreement to purchase the Property, making provision therein for the removal by the Company of such liens. The general state and county election was approaching, and the Mayor and City Council having come to the conclusion that it would be advisable to get an expression of the electors upon the subject, a "straw ballot" was taken in connection with said election on the 5th day of November, 1918. No special municipal election was regularly called for said date nor was the proposition submitted at the regular municipal election on the 4th day of March, 1919, following. No "plan or system ordinance" was submitted to the electors for their approval at said November election, as contemplated by Rem. Comp. Stat., § 9489 (8006), but the electors were asked to vote upon the proposition of the City purchasing the Property for $15,000,000 in utility bonds payable solely from the revenues. This proposition was approved by a heavy majority. On December 7th, 1918, Mr. Meier transmitted to the City Council, in substantially its final form, Council Bill No. 28252 (Ordinance No. 39069), embodying the property purchase agreement and an agreement for the sale of power to operate the system. No provision was contained therein for the payment of any taxes by the City, the burden of paying all taxes and lienable claims being placed upon the Company. The plan or system ordinance (No. 39025) providing for the issuance of the necessary bonds to pay for the Property had theretofore been transmitted to the City council but had not as yet been passed. The closing of the deal was hindered by delay in preparing and filing an inventory of the Property and a new "tax year" was approaching. On December 27th, 1918, the City Council, in Committee of the Whole, at the request of the Company, directed the insertion of the following language next after the covenant of the Company relating to the payment of taxes as then provided by the purchase agreement contained in said Council Bill No. 28252, to-wit:

"Provided, that state, county and municipal taxes levied against the Property for the year 1919 shall be paid, before the same shall become delinquent, by the respective parties hereto, in amounts proportional to the respective periods of time that said parties are respectively in possession of said Property during the year 1919."

This was the first intimation that the City was to pay taxes, or any other item, in excess of the $15,000,000 and interest theretofore agreed upon as the purchase price. Four days later (December 31st, 1918), Council Bill No. 28252 was passed by the City Council and was later assigned ordinance number 39069. The plan or system ordinance had been previously passed on the same day and assigned number 39025. There is no intimation in the plan or system ordinance that the purchase price is to be augmented by the assumption of any taxes. Unless the taxes were considered a part of the purchase price, an agreement to pay them would be void, in any event. The taxes could not be considered an operating cost of the City because, City property being exempt from taxation, any taxes assessed before the City became owner and, under the law, being assessable as personal taxes, would be assessed against the Company. Clearly an agreement to pay the Company's taxes, unless as a part of the purchase price, would be forbidden by Sec. 7, Art. VIII, of the State Constitution, which provides as follows:

[fol. 8] "No county, city, town or other municipal corporation shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, company, or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation."

The fact that the taxes constitute a part of the purchase price and are not an operating expense must be kept in mind in the course of this discussion, because different principles of law apply in the premises.

The "power contract" contained in Ordinance No. 39069 provides for monthly payment for power out of the City Railway Fund as an operating expense, as the same is furnished, but the undertaking to pay taxes in the purchase contract contained in the same ordinance is not limited to any special fund but purports to be an absolute undertaking on the part of the City to pay to the County Treasurer. Had there been any intimation at the time of the insertion of the "proviso" that the City was not intending to pay the taxes out of the General Fund, the Company would have undoubtedly insisted upon the language being made more specific in this respect. The Company knew, and the City Council, if it did not know, should have known, that there would be no money in the City Railway Fund on the 15th of March, 1920, to pay such taxes. The revenues were not, and would not be, sufficient for such purpose. Litigation between the City and the Company had just been completed in the preceding July in which the City sought to prevent the Company from discontinuing the sale of four-cent commutation tickets. Discussing the proof offered by the Company, the Supreme Court in that case (State ex rel. Seattle v. Public Service Commission, 103 Wash. 72, 80) said:

"The evidence shows that the traction company and its street railway system were not receiving any net returns; that there was

in fact a deficit at the time of the hearing, and if depreciation is not considered or allowed for, the returns of the company would be less than two per cent upon the actual cost of the railway system."

Having in view this situation, and the further facts that the revenues in the City's hands would be burdened with an additional charge for interest on the purchase price amounting to $750,000 per annum; and that the transfer of the system was being expedited to prevent a strike by the street railway employees, who were receiving a very insufficient wage, war conditions considered, and that the strike was being temporarily averted by a general understanding between the Company, its employees, the Mayor, and the City Council that, upon the taking over of the system by the City, salaries would be advanced to a living wage, thus increasing the cost of operation approximately a million dollars a year; it is clear that the Company knew, and that the Mayor and City Council knew, that there would be no money in the City Railway Fund to meet such taxes and that it was the understanding (as the language of the proviso clearly indicates) that the City Council was agreeing to pay such taxes out of general funds. The Company was not leaning on a broken reed nor accepting promises that the taxes would be paid out of the City Railway Fund when the inevitable (and by it necessarily anticipated) default would result in the distraint of its other properties. In this connection, it is well to keep in mind that it [fol. 9] was the openly announced policy of the Mayor not to raise the street railway fares above five cents but to make up any deficit in the City Railway Fund on account of operation by the levy of general taxes, and that this policy was discussed in the press and in "Committee of the Whole" in the presence of the representatives of the Company, before the final passage of the ordinances. That the company anticipated that the City Railway Fund would not be sufficient to pay operating expenses, let alone taxes, is made clear by its brief in the "Twichell case." Discussing such possibility, the Company uses the following language:

"If in the future the ownership and operation of the property should entail expense, * * * it (the City) will meet it by making provision for the same in its annual budget, as the statute directs. * * * That the municipalities have the right to pay the cost of operation and maintenance by taxation if necessary is shown by Section 9208 of R. & B. Code. By this statute they are required in their annual budget to provide for the operation and maintenance of each public utility. Now, if it has the power in case of unforseen exigencies to meet such cost in that way, it certainly has the right frankly to recognize that it may be confronted with that necessity."

The anticipated condition of the City Railway Fund soon ripened into actuality. As was said in Asia v. Seattle, 119 Wash. 674, 679, "a considerable deficit appeared almost immediately and has steadily grown."

The property purchase contract was executed on the 10th day of February, 1919, in exact accordance with the terms and conditions

therefor specified in said Ordinance No. 39069. This agreement has been filed under Comptroller's File No. 72566. The deed furnished by the Company to the City pursuant to said contract was executed and delivered March 31st, 1919, and is filed as Comptroller's File No. 72982 (Real Estate File No. 8531). The deed provides a place for execution and acknowledgment by the representatives of the City, but was never signed or acknowledged by the said officials, nor was the deed formally accepted by ordinance. In lieu of the language appearing in the proviso contained in the contract, the deed contains the following clause:

"It is also further agreed between the parties hereto that if at the time of the delivery of this deed any lien shall have attached to the property, or any part thereof, for the year 1919 for any tax for the year 1919, such lien shall not constitute a breach of warranty, and that if such tax shall become collectible, the same shall be paid before the same shall become delinquent by the respective parties hereto in amounts proportional to the respective periods of time that the said parties are respectively in possession of said property during the year 1919."

The fact that the City officials did not sign the deed is not, however, of controlling importance, so far as this opinion is concerned, for, as we have heretofore noted, the acceptance of property by a city subject to a lien, without arrangement for payment by the vendor, is in itself the creation of a debt; nor, for a like reason, is it important to consider whether or not the original purchase agreement, including the proviso, was "merged" in the deed. The advice of the [fol. 10] Corporation Counsel was not sought by the City Council concerning the validity of the agreement to assume the taxes, nor was the question of this tax litigated or considered in the case of Twichell v. Seattle, 106 Wash. 32, decided March 5, 1919, (ten days before the imposition of the tax). Just before said tax became delinquent, City authorities suggested to a representative of the Company the advisability of paying the tax "under protest" in order to avoid the fifteen per cent interest which would commence to accrue March 15th, 1920. Certain members of the City Council then had in mind making provision for the tax by including an item in the general tax levy to take care of the same. The representative of the Company requested that payment be not made, for fear of the "psychological effect" of such payment upon the litigation brought by the Company to test the validity of the tax. In said suit, the City was named as a defendant by the Company, but the Corporation Counsel, Mr. Meier, was expressly directed by the City Council to litigate on the side of the Company, in the face of a statement by Mr. Meier that the City would be money ahead if the tax were paid. Both the trial court and the Supreme Court refused to adjudicate the question of apportionment of the tax in said case (Puget Sound Power & Light Co. v. Seattle, et al., 117 Wash. 351), on the theory that it was not involved in the litigation. The question of the validity of the agreement to pay the tax was not put in issue.

Arriving, then, at the answer to your first question, you are advised that, under Rem. Comp. Stat., § 9489 (8006), where a general debt is to be incurred as a part of the purchase price of a municipal public utility, the amount of such indebtedness and the terms thereof must be included in a plan or system ordinance, specifying the manner of payment, and which must be submitted to the qualified voters for their ratification or rejection, and that, in the absence of the assent of three-fifths of the qualified voters voting, the City Council has no authority to proceed. It therefore necessarily follows from the foregoing discussion that said street railway taxes cannot be paid by the use of General Fund moneys. This results from the terms of the statute, not from the decision in the "Asia case," the effect of which case was to judicially extend the prohibition of the statute so as to prevent the use of General Fund moneys in the payment of operating expenses where the plan or system had not been submitted to the electors.

We will now consider your second question concerning authority to pay such taxes out of the City Railway Fund. It is clear, of course, that payment cannot be made out of the special fund created by Plan or System Ordinance No. 39025, designated as "Municipal Street Railway Bond Fund, 1919," since that fund is, by the ordinance, specifically limited in its expenditures to the payment of the $15,000,000 in bonds and the interest thereon, and in its assets to the bare amounts necessary for such purpose. Can, then, the void agreement to pay such taxes out of the General Fund be now indirectly validated by payment out of the City Railway Fund? It is to be remembered that the City has but a limited title to the moneys in the City Railway Fund, and that the street railway system itself is held in trust in order "to give the citizen the best possible service at the lowest possible price." The City Railway Fund is not the municipal household drudge, subject to have imposed upon it at will the burdens of improvident and void promises of former City Councils.

The City Charter, Art. IV, Sec. 28, provides as follows:

[fol. 11] "Neither the city council nor any officer, board, department or authority shall allow, make valid or in any manner recognize any demand against the city which was not at the time of its creation a valid claim against the same, nor shall they or any of them ever allow or authorize to be paid any demand which, without such action, would be invalid, or which shall then be barred by any statutes of limitation, or for which the city was never liable, and any such action shall be void."

Clearly, then, the void agreement to pay out of the General Fund cannot now be fulfilled by payment out of the City Railway Fund.

But let us assume, for the purposes of argument, that it was not the original intention of the City Council in the passage of Ordinance No. 39069 that such taxes should be payable out of the General Fund but rather that the same should be payable out of the City Railway Fund. If such was the intention of the City Council,

it has never been legally expressed or made effective. Art. IV, Sec. 27, of the Charter, provides as follows:

"No debt or obligation of any kind against the city shall be created by the city council except by ordinance specifying the amount and object of such expenditure."

The City Council, by the proviso contained in Ordinance No. 39069, fails to comply with said charter provision, nor does Ordinance No. 39069, either directly or by implication, amend Ordinance No. 33333 so as to permit the payment of any part of the purchase price of the Property from the City Railway Fund. Said ordinance provides as follows:

"Section 1. There is hereby created and established the City Railway Fund, into which shall be paid all revenues derived from the City Railway Department, and from which shall be paid all expenses of operation and maintenance of the city railway system."

By the terms of the ordinance expenditures from the City Railway Fund are limited to the expenses of operation and maintenance. No other payments can be made from said fund under the terms of said ordinance (in the absence of amendment), except such payments as are authorized special appropriation in compliance with Sections 7 and 17, Art. IX, of the Charter. If, therefore, it was the intention of the City Council to pay such taxes out of the City Railway Fund, it has never ripened into a legal right or obligation, and such intention is still inchoate and depends for its vitality upon some further act of the City Council. But is such a "gentlemen's agreement" binding on future Councils or can the City Council now recognize such an obligation?

Keeping in mind that such tax is a part of the purchase price, let us refer back to Rem. Comp. Stat., § 9489 (8006), specifying the manner in which municipal public utilities may be acquired. We find that, under the statute, in every instance provision for the purchase, acquisition or construction of a municipal public utility, or of additions or betterments thereto, or extensions thereof, when contemplated by the city authorities, must be embodied in a plan or system ordinance and (with two exceptions) submitted to the electors and by them assented to by a majority vote, if no general [fol. 12] debt is to be incurred, or by a three-fifths vote, if a general debt is to be incurred. The exceptions above referred to (where the submission to the electors is not necessary) are, 1st, extensions to utilities authorized prior to July 1st, 1910, for which no general debt is to be incurred, and, 2nd, municipal utility enterprises, for which no general debt is to be incurred, where, by charter, the City Council is authorized to acquire, open or operate the same. In these two cases, submission to the voters is excused by the statute, but the adoption of a plan or system ordinance specifying the manner of payment is not excused. This is especially important here, in view of the fact that the Charter authority of our City Council is subject to referendum under our Charter, so that, in addition to

the statutory requirement, it is apparent that, under the Charter, as a safeguard to the right of referendum, the electors are entitled to be advised by the terms of a plan or system ordinance just what plan of payment is contemplated. But the statute in mandatory. A municipality has no power or authority to engage in a proprietary function except such as may be granted by statute, and when authority is granted by statute to acquire a public utility, the corporate authorities must strictly comply with the same. The statute is at once the font of authority, and a limitation upon the power, of the City Council, and the City Council, in the purchase of a public utility, must bring itself within its terms. If a special debt payable solely out of the revenues is to be incurred in respect to such a utility, the City Council must in the plan or system ordinance, under Rem. Comp. Stat., § 9491 (8008), create a special fund for the purpose of defraying the cost, and issue and sell (or exchange) bonds or utility warrants, bearing interest not exceeding six per cent. per annum, in evidence of such obligation. As was said in Hansard v. Green, 54 Wash. 161, 165:

"Payment is as much a part of the 'plan or system' as is the purchase, and a method should be provided in the ordinance."

Again, in Uhler v. Olympia, 87 Wash. 1, 6, the Supreme Court said:

"The statute is the measure of the city's power in such cases * * *. We are bound, therefore, to measure the subsequent conduct of the city by the limit of its power under the statute and as accepted by the council when it passed the preliminary ordinance * * *

"That a city acting under a special statute is bound by the terms of the statute and must submit the plan that it intends to carry out, is too well settled to require any extended citation of authority."

And at page 9:

"If the manner of payment is an essential part of the plan, and it cannot be doubted under our own decisions and other authorities, it follows that the city cannot, by a subsequent ordinance, change the plan in any of its essentials without a like vote of the people."

And again, at page 10:

[fol. 13] "We find that the council is required to issue and sell bonds or warrants, in payment for the public utility, 'bearing interest at a rate not exceeding six per centum per annum.' This limitation on the power of the council is just as prohibitive, and if disobeyed would result in the same evil, as if the statute had provided that the bonds should not be sold for less than par."

Turning now to the proviso in Ordinance No. 39069 which, it must be remembered, was not a plan or system ordinance, we are confronted with the problem that the present effect of said agree-

ment, if valid, is to require the payment of interest at fifteen per cent., the delinquency rate attached to said taxes since March 15th, 1920. In our opinion, this cannot be done.

Furthermore, the City Council, in passing the plan or system ordinance (No. 39025) was exercising a specially delegated legislative power. It was acting in a different capacity when it passed Ordinance No. 39069 authorizing the signing of a contract. If payment of said taxes (being part of the purchase price) was to have been made out of the revenues of such utility, it should have been provided for in said Ordinance No. 39025 (the plan or system ordinance), and a special fund should have been created therefor and bonds or utility warrants sold, payable out of such special fund, in order to meet such taxes when they became due.

This rule of law was conceded by the Company in connection with this very transaction. In discussing the utility statute, the Company said in its brief in the "Twichell case:"

"Now when is it that the City Council creates the special fund or funds? There can be but one answer to this question. It is when the City Council passes the ordinance establishing the special fund or funds. In other words, it exercises due regard for the cost of operation and maintenance before it makes the contract with him who purchases the bonds either with his property or with his money."

The Council had no authority whatever in the matter of the purchase of the Property except such authority as might be conferred by, and it was subject to such limitations as might be contained in, the utility statute; and any attempt to bind the revenues of the system for a part of the purchase price in any other manner, or at any other time, than that prescribed by the statute would be an encroachment on the rights of future Councils, unauthorized by law and ultra vires and void. Being ultra vires and void, the attempt to rectify or recognize at this date any such void agreement would come within the prohibition of Art. IV, Sec. 28, of the Charter, above quoted. This may seem a harsh rule, but it is founded upon sound public policy. In discussing the plea of ultra vires, our Supreme Court, in the case of State v. Pullman, 23 Wash. 583, 586, said:

"The authority of a private agent is known only to the agent and the principal, but the authority of the officers of a municipal corporation is a matter of public record, which is available to every one. The scope of their authority is embraced either in their charters or in the statutes of the state, and the limitation upon their powers is equally available to every one who desires to deal with them. Hence, [fol. 14] if one, knowing their powers and limitations, sees fit to enter into illegal contracts, contracts which the law has forbidden for the protection of the tax payers of the municipality, he has no right to complain when he is estopped from enforcing his illegal contract by a plea of ultra vires by the citizens of a municipality."

There is a further objection to the present use of the City Railway Fund to met the payment of such taxes. We are informed by the

Comptroller that there are outstanding obligations, consisting of utility bonds which are charges against the gross revenues of the street railway system, in the amounts set opposite the plan or system ordinances named below:

Ordinance No. 39025	.....	$12,501,000.00
" No. 39492 (Amended by Ord. No. 41512)		790,000.00
" No. 39493	.....	550,000.00
" No. 39494	.....	60,000.00
" No. 42870 (Amended by Ord. No. 43139)	.....	235,000.00
" No. 42870 (Amended by Ord. No. 43611)	.....	55,000.00

Even assuming that the objections heretofore noted were not well taken, it would be the duty of the City to meet all of such bonds, with the interest thereon, and the cost of operation, maintenance and replacement in the meantime, before diverting the City Railway Fund to any other purposes. In the case of Uhler v. Olympia, 87 Wash. 1, 12, the Supreme Court said:

"Under the ordinance and probably under the statute, the earnings or revenues are a pledge in gross to meet the bonds. If the revenues were insufficient to meet the one or the other, the payment of the bonds might be compelled, to the ultimate loss or impoverishment of the general fund."

The City Railway Fund was judicially designated by the Supreme Court as an insolvent fund in the case of Asia v. Seattle, 119 Wash. 674. We might be disposed to quarrel with said determination as not supported by the evidence, but it is none the less a final judicial decree and any attempt to pay such taxes out of said fund at this time would certainly invite injunctive proceedings by holders to protect some of the above mentioned utility bonds, or by taxpayers to prevent a general liability resulting by reason of the diversion by the City of the street railway revenues to other purposes than those to which they have already lawfully been pledged. In this connection, it is worthy of note that the Company, in the case of Puget Sound Power & Light Co. v. Seattle, 271 Fed. 958, (commonly known as the "specific performance" case), contended that the City could not even use the City Railway Fund for the purpose of maintaining and operating the sytsem, except at its own peril, the penalty being liability out of the General Fund if the bonds and interest were not met at the due date.

[fol. 15] Specifically answering your second question, you are therefore advised that, in our opinion, said street railway taxes may not voluntarily be paid by the City out of the City Railway Fund, and that, until all of the obligations hereinabove discussed, as well as the interim cost of maintenance, operation and replacement of the municipal street railway system, have been taken care of, such payment is clearly subject to be enjoined.

Yours very truly, (Thomas J. L. Kennedy), Corporation Counsel.

[fol. 16] EXHIBIT "C" TO AFFIDAVIT OF THOMAS J. L. KENNEDY

Vol. 37, Folio 373. Charter Session

Be it remembered that the City Council of The City of Seattle met in the Council Chamber in the County & City Building, in the City of Seattle, Washington, on this the 3rd day of July, 1922, at the hour of two o'clock p. m., pursuant to the provisions of the City Charter.

President Fitzgerald in the Chair.

On roll call the following members were present: Blaine, Cohen, Erickson, Hesketh, Landes, Miracle, Tindall, Mr. President—8; absent: Carroll—1.

Whereupon the following proceedings were had:

* * * * * * *

Folio 376

Communications and Reports from City Officials

* * * * * * *

#85525. Communication of City Comptroller relating to Supreme Court decision relative to railway taxes for 1919.

Referred to Finance Committee.

* * * * * * *

Folio 384

Thereupon the Council adjourned.

Approved, C. B. Fitzgerald, President of the City Council.

Attest: H. W. Carroll, City Comptroller and ex-Officio City Clerk.

* * * * * * *

[fol. 17] Vol. 37, Folio 417. Charter Session

Be it remembered that the City Council of The City of Seattle met in the Council Chamber in the County & City Building, in The City of Seattle, Washington, on this the 24th day of July, 1922, at the hour of two o'clock p. m., pursuant to the provisions of the City Charter.

President Fitzgerald in the Chair.

On roll call the following members were present: Blaine, Carroll, Cohen, Erickson, Hesketh, Landes, Miracle, Tindall, Mr. President—9; absent—None.

Whereupon the following proceedings were had:

* * * * * * *

Folio 426

Reports of Standing Committees

From Finance Committee:

* * * * * * *

#85525. Communication of City Comptroller relating to decision imposing 1919 city railway taxes on city (to which is attached letter dated July 6, 1922, from A. W. Leonard, President Puget Sound Power & Light Company, addressed to City Council and Mayor, on the Subject); recommends it be placed on file. Report adopted.

* * * * * * *

Folio 435

Thereupon the Council adjourned.
Approved: A. Lou Cohen, President pro tem. of City Council.
Attest: H. W. Carroll, City Comptroller and ex-officio City Clerk.

[fol. 18] State of Washington,
County of King,
City of Seattle, ss:

I, H. W. Carroll, City Comptroller and ex-officio City Clerk of the City of Seattle, do hereby certify that the within and foregoing is a true and correct copy of all proceedings of the City Council of The City of Seattle, relating to Communication of City Comptroller in re decision of Supreme Court imposing 1919 street railway taxes on city and Puget Sound Traction, Light and Power Company, bearing City Clerk's File No. 85525, as the same appears on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed hereto the seal of the City of Seattle this 28th day of May, 1924.
H. W. Carroll, City Comptroller and ex-officio City Clerk of the City of Seattle, by E. M. Street, Deputy. (Seal.)

[fol. 19] Exhibit "D" to Affidavit of Thomas J. L. Kennedy

Vol. 39, Folio 290. Charter Session

Be it remembered that the City Council of The City of Seattle, met in the Council Chamber in the County & City Building in the City of Seattle, Washington, on this the 12th day of May, 1924, at

the hour of two o'clock p. m., pursuant to the provisions of the City Charter.

President Fitzgerald in the Chair.

On roll call the following members were present: Blaine, Carroll, Cohen, Drake, Hesketh, Landes, Miracle, Tindall, Mr. President—9; absent: None.

Whereupon the following proceedings were had:

* * * * * * *

Folio 296

Communications & Reports from City Officials

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Folio 297

#94499. Opinion of Corporation Counsel relating to validity of agreement to pay Puget Sound Traction, Light & Power Company Street railway tax. Referred to Committee of the Whole.

* * * * * * *

Petitions, Memorials and Remonstrances

* * * * * * *

Folio 298

#94491. Communication of Puget Sound Power & Light Company relating to taxes on railway property for the year 1919.

Referred to Committee of the Whole.

* * * * * * *

Folio 312

On motion, the Council resolved itself into Committee of the Whole, for the consideration of the communication of the Puget Sound Power & Light Company (File #94491) relating to taxes on [fol. 20] street railway property for the year 1919, and other matters relating thereto.

Mr. Blaine was elected Chairman of the Committee of the Whole.

Thereafter, at 4:30 o'clock p. m., the Committee of the Whole arose, and

On roll call the following members were present: Blaine, Carroll, Cohen, Drake, Hesketh, Landes, Miracle, Tindall—8; absent: Mr. President—1.

Mrs. Miracle was elected President pro tem. of the City Council.

The Committee of the Whole reported as follows:

After consideration of Files Nos. 94242, 94491, relating to payment of 1919 taxes on street railway property, and No. 94499, opinion

of Corporation Counsel relating to validity of agreement to pay Puget Sound Traction, Light & Power Company a proportion of said taxes, we recommend that the City Clerk be instructed to report to the Puget Sound Power & Light Company that in view of the opinion of the Corporation Counsel the city is without power to voluntarily make payment of these taxes and that the documents referred to above be placed on file. Report adopted.

* * * * * * *

Thereupon the Council adjourned.
Approved: C. B. Fitzgerald, President of the City Council.
Attest: H. W. Carroll, City Comptroller and ex officio City Clerk.

[fol. 21] STATE OF WASHINGTON,
County of King,
City of Seattle, ss:

I, H. W. Carroll, City Comptroller and ex officio City Clerk of the City of Seattle, do hereby certify that the within and foregoing is a true and correct copy of all proceedings of the City Council of The City of Seattle relating to Opinion of Corporation Counsel in re validity of agrement to pay Puget Sound Traction, Light & Power Company street railway taxes (City Clerk's File No. 94499) and Communication of Puget Sound Power & Light Co. relating to taxes on railway property for the year 1919 (City Clerk's File No. 94491), as the same appears on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed hereto the Seal of the City of Seattle this 28th day of May, 1924.
H. W. Carroll, City Comptroller and ex Officio City Clerk of the City of Seattle, by E. M. Street, Deputy. (Seal.)

[fol. 22] EXHIBIT "E" TO AFFIDAVIT OF THOMAS J. L. KENNEDY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

No. 149,200

S. B. ASIA, DANIEL BASS, JOHN H. CARTER, HERMAN CHAPIN, Pierre P. Ferry, T. N. Haller, Paul C. Harper, Roy J. Kinnear, W. W. Miller, E. Rosenberg, R. C. Southworth, David Whitcomb, and Worrall Wilson, Plaintiffs,

vs.

CITY OF SEATTLE, a Municipal Corporation; ED. L. TERRY, as Treasurer of the City of Seattle, and Harry W. Carroll, as Comptroller of the City of Seattle, Defendants.

JUDGMENT UPON REMITTITUR

This cause coming on regularly this day upon the motion of the plaintiffs that judgment be entered in accordance with the remittitur of the Supreme Court; and it appearing to the court that on June 20th, 1922, the Supreme Court of the State of Washington having considered the appeal of the plaintiffs from the judgment rendered by this court in this action on the 26th day of January, 1922, upon such consideration reversed said judgment and adjudged that this court should have granted the prayer of the plaintiffs and enjoined the City and its officials from in any manner encroaching upon the general fund or placing in any degree upon the taxpayers of the city the burden of the operation of the street railway system, which system the city purchased from the Puget Sound Light & Power Company; and it further appearing to the court that the remittitur of the Supreme Court has been duly transmitted and on the 22nd day of June, 1922, was filed and entered in this cause; and it further ap-[fol. 23] pearing to the court that this court the amended complaint was further amended so as to include in the remedy sought the levying of any tax for the purpose of defraying the cost or expense of operation and maintenance of said street railway system;

It is now therefore ordered, adjudged and decreed that the defendants, and each of them, be enjoined from using in any way any moneys from (including the borrowing thereof) the general funds of the City of Seattle in the operation and maintenance of the street railway or in the payment of depreciation charges or cost of making replacements; also from charging or transferring to other departments any portion of the cost of operating or maintaining said street railway system; also from paying such cost out of the general or other funds appropriated to and available for the maintenance of such other departments; also from levying any tax for the purpose of raising funds to be expended in the operation or maintenance of said street railway system, and from in any manner encroaching

upon the general fund or placing the burden in any degree upon the taxpayers for such cost or expense of operating or maintaining said street railway system.

It is further ordered that judgment be and is hereby entered in favor of the plaintiffs against the defendant City of Seattle in the sum of Nineteen Dollars and twenty cents ($19.20) costs in this court.

Done this 30th day of June, 1922.

J. T. Ronald, Judge.

[File endorsement omitted.]

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUBMISSION OF MOTION TO DISMISS

Now on this 2nd day of June, 1924, this cause comes on for hearing on motion for temporary injunction and on motion to dismiss. Plaintiff moves for leave to file a supplemental bill herein. An order is signed allowing the same. Defendants move to dismiss said supplemental bill and motion for temporary injunction is argued and taken under advisement. Motion to dismiss is argued and taken under advisement.

Equity Journal No. 1, Page No. 306.

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

THE CITY OF SEATTLE'S PRECIPE FOR TRANSCRIPT FOR APPEAL—Filed Sept. 29, 1924

To the Clerk of the above entitled Court:

You will please prepare and duly authenticate as a part of the transcript of the record in the above entitled cause on the appeal of the above named plaintiff heretofore allowed, to the Supreme Court of the United States, and transmit such additional transcript to the Clerk of the Supreme Court of the United States at Washington, District of Columbia, within sixty days from the 15th day of September, 1924; such additional transcript of record to consist of the following:

1. Affidavit of Thomas J. L. Kennedy.

2. The minute or journal entry of motion of the City of Seattle in open court that its motion to dismiss as directed to the original

bill of complaint be applied to and directed to and against the amended and supplemental bill of complaint of the plaintiff; and the minute or journal entry of the court granting such motion and directing that the motion to dismiss the original bill of complaint be applied to and directed as against the amended bill of complaint.

Thomas J. L. Kennedy, Corporation Counsel, George A. Meagher, Assistant; Edwin C. Ewing, Assistant, Solicitors for Defendant The City of Seattle.

[File endorsement omitted.]

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 25, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel for the appellee, City of Seattle, filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the supplemental record of the City of Seattle on appeal herein from the judgment of the said United States District Court for the Western District of Washington, to the Supreme Court of the United States.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellee, City of Seattle, herein, for making supplemental record, certificate or return of said City of Seattle, to the Supreme Court of the United States in the above entitled cause, to wit:

[fol. 27] Clerk's fees (Sec. 828 R. S. U. S.) for making supplemental record, certificate or return, 67 folios at 15¢ .. $10.05
Certificate of Clerk to supplemental transcript of record, 4 folios at 15¢ 60
Seal to said Certificate 20

I hereby certify that the above cost for preparing and certifying said supplemental record, amounting to $10.85, has been paid to me by solicitors for appellee, City of Seattle.

In witness whereof I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said District this 28th day of October, 1924.

F. M. Harshberger, Clerk United States District Court, Western District of Washington. (Seal of the United States District Court, Western District of Washington.)

[fol. 27½] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY APPELLANT OF PARTS OF RECORD TO BE PRINTED—Filed Nov. 3, 1924

To the Clerk of the above-entitled Court:

The Appellant above named, having filed in the above-entitled Court the record in the above-entitled cause, files this its statement of the errors on which it intends to rely for reversal of the decree appealed from and of the parts of the record which it deems necessary for the consideration thereof, to-wit:

I

The District Court of the United States for the Western District of Washington erred in sustaining the motion of the defendants to dismiss the amended and supplemental bill of the above-named appellant, and in holding that the Eleventh Amendment to the Constitution of the United States deprived such District Court of jurisdiction to hear and determine the above-entitled cause as presented by the original and the amended and supplemental bill.

II

The District Court erred in dismissing the above-entitled suit for want of jurisdiction in the Court as a Federal Court.

[fol. 28] The appellant deems the entire record filed by it in the above-entitled cause in the above-entitled Court, omitting the titles of the papers, necessary for the consideration by the Court and, with the exception of such titles, appellant designates the entire record as the portions of such record necessary to be printed.

The appellant objects to the matter in the supplemental transcripts, claimed by appellees to be parts of the record, being considered as parts of the record and objects to the printing of any portion thereof, except that portion which states that the motion of the City of Seattle addressed to the original bill be also considered as interposed to the amended and supplemental bill of appellant.

James B. Howe, Hugh A. Tait, Edgar L. Crider, Counsel for Appellant.

Seattle, Washington, October 24, 1924.

The undersigned hereby acknowledge receipt of the foregoing notice.

Thomas J. L. Kennedy, George A. Meagher, Edwin C. Ewing, Counsel for The City of Seattle, Appellee. Malcolm Douglas, by G. D., Howard A. Hanson, by G. D., Counsel for County of King, W. W. Shields, as Treasurer of King County, and Matt Starwich, as Sheriff of King County, Appellees.

[fol. 28½] [File endorsement omitted.]

[fol. 29] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

DESIGNATION BY APPELLEE THE CITY OF SEATTLE OF PARTS OF RECORD TO BE PRINTED—Filed Nov. 15, 1924

To the Clerk of the above-entitled Court:

The Appellee The City of Seattle hereby requests and directs that the entire supplemental transcript of the record of said The City of Seattle be printed as a part of the record.

Thomas J. L. Kennedy, Corporation Counsel; George A. Meagher, Assistant, Attorneys for Appellee The City of Seattle.

Seattle, Washington, November 8, 1924.

The undersigned hereby acknowledge receipt of the foregoing notice.

James B. Howe, Hugh A. Tait, Edgar L. Crider, Attorneys for Appellant Old Colony Trust Company, Trustee. Malcolm Douglas, by G. O. D., Howard A. Hanson, by G. O. D., Attorneys for County of King, W. W. Shields, as Treasurer of King County, and Matt Starwich, as Sheriff of King County, Appellees.

[fol. 29½] [File endorsement omitted.]

[fol. 30] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

DESIGNATION BY APPELLEE THE COUNTY OF KING OF PARTS OF RECORD TO BE PRINTED—Filed Nov. 20, 1924

To the Clerk of the above-entitled Court:

The Appellees, County of King, W. W. Shields, as Treasurer of King County, and Matt Starwich, as Sheriff of King County, hereby request and direct that the entire supplemental transcript of the record of said Appellees, County of King, W. W. Shields, as Treasurer of King County, and Matt Starwich, as Sheriff of King County, be printed as a part of the record.

Malcolm Douglas, Howard A. Hanson, Solicitors for Appellees, County of King, W. W. Shields, as Treasurer of King County, and Matt Starwich, as Sheriff of King County.

Seattle, Washington, November 14, 1924.

The undersigned hereby acknowledge receipt of the foregoing notice.

James B. Howe, Hugh A. Tait, Edgar L. Crider, Solicitors for Appellant Old Colony Trust Company, Trustee.

Copy of within received Nov. 14, 1924. Thomas J. L. Kennedy, Corporation Counsel, Solicitor for Appellee The City of Seattle.

[fol. 30½] [File endorsement omitted.]

Endorsed on cover: File No. 30,679. W. Washington, D. C. U. S. Term No. 194. Old Colony Trust Company, as trustee, appellant, vs. The City of Seattle, County of King, W. W. Shields, as treasurer, etc., et al. Filed November 3, 1924. File No. 30,679.

MAY 8

In the

Supreme Court of the United States

October Term, 1925

No. 194

OLD COLONY TRUST COMPANY, as Trustee,
Appellant

vs.

THE CITY OF SEATTLE, COUNTY OF KING, W. W. SHIELDS, as Treasurer, and MATT STARWICH, as Sheriff of King County,
Appellees

Brief of Appellant in Opposition to Supplemental Motion to Dismiss Appeal

JAMES B. HOWE
HUGH A. TAIT
EDGAR L. CRIDER
Counsel for Appellant

A.A.
96 SPRING ST.
MAIN 2279

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In the

Supreme Court of the United States

October Term, 1925

No. 194

OLD COLONY TRUST COMPANY, as Trustee,
Appellant

vs.

THE CITY OF SEATTLE, COUNTY OF KING, W. W. SHIELDS, as Treasurer, and MATT STARWICH, as Sheriff of King County,
Appellees

Brief of Appellant in Opposition to Supplemental Motion to Dismiss Appeal

Since the argument of the appeal in this case appellees have filed a supplemental motion, and a brief in support of the same, to dismiss the appeal. The motion is based upon two grounds:

1. That appellant has no interest in the controversy because after the entry of the decree it assigned its

rights to Puget Sound Power & Light Company, hereinafter referred to as the "Company."

2. That there is a defect of parties appellant because the Company is the real party in interest and is not a party to this appeal. (Pp. 1 and 2, Supplemental Motion to Dismiss.)

I.

Appellant's suit was instituted to obtain exoneration of the property covered by its mortgage on which all taxes had been paid, and if compelled to pay any portion of the taxes upon the street railway property of the city in order to prevent the sale of the mortgaged property, then to obtain subrogation to the extent of its payment. (R. 1-20.)

The motion to dismiss is based on the ground that since the entry of the decree appellant has been repaid by its mortgagor (the company) the amount of the street railway taxes which appellant as mortgagee and trustee was compelled to pay to prevent the sale of the trust property to satisfy the taxes upon the street railway property which the city was obligated to pay. (Supplemental Motion to Dismiss 16-20.) The reimbursement of appellant by the Power Company was in accordance with the requirements of the mortgage executed to appellant as trustee by the

company. (Exhibit A, p. 219, record on application for a writ of certiorari in *City v. Puget Sound Power & Light Company*, No. 627, October Term, 1925.) The Power Company upon so reimbursing the appellant was entitled to be subrogated to the rights of appellant and became the equitable assignee of such rights. It succeeded to appellant's rights by operation of law.

Lidderdale's Executors v. Robinson, 12 Wheat. 594;

(Followed in *United States v. National Surety Co.*, 254 U. S. 73.)

"Although the appellees did not purchase the state's claim, or become, technically, the assignee thereof, her lien will be regarded, in equity, as subsisting, so far as is necessary for their protection."

Memphis etc. Railroad v. Dow, 120 U. S. 287, 301.

"As soon as the right to subrogation arises, equity makes the assignment, and hence the right of the person entitled by no means depends on, or is affected by, the willingness or unwillingness of the creditor to transfer the security."

25 Ruling Case Law, p. 1320, Section 8.

"Subrogation is not assignment. The most that can be said is that the subrogated creditor by operation of law represents the person to whose right he is subrogated."

New Orleans v. Gaine's, Administrator, 138 U. S. 595, 606;

Pomeroy's Equity Jurisprudence, 3rd Ed. Secs. 1211-1212;

37 Enc. of Law and Procedure, pp. 370, 380, 443, 467;

Piedmont Coal Co. v. Hustead, 294 Fed. 247, 252.

Appellant would not be permitted to voluntarily destroy the right to subrogation upon or after being reimbursed by the company and we submit that the court will not require the involuntary destruction of such right of subrogation.

Appellant was entitled to institute its suit before payment to obtain a decree that upon payment it be subrogated to the lien of the taxes. Upon payment of a part it became entitled to subrogation *pro tanto*, the entire amount of taxes with interest and costs being paid by appellant and the company. Upon appellant being reimbursed the company became the *cestui que trust* entitled to enforce the right which it so acquired from appellant in the name of appellant.

Sheldon on Subrogation, Secs. 1, 4, 9, 24, 88;

Pomeroy's Equity Jurisprudence, 3rd Ed. Sec. 186;

Webber Lumber Company v. Shaw, 189 Mass. 366;

Cockrum v. West, 122 Indiana, 372;

City of Keokuk v. Love, 31 Ia. 119, 124;

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University State Bank v. Steves, 85 Wash. 55;

Childs v. Smith, 51 Wash. 457, 461;

Johnson v. Martin, 83 Wash. 364, 375;

Packwood v. Briggs, 25 Wash. 530, 538;

Carr v. Davis, 64 West. Va. 522.

II.

TRANSFER *Pendente Lite* DOES TERMINATE APPEAL

If the instrument set forth in the appendix to the supplemental motion to dismiss, executed by appellant to the company on the 1st day of July, 1924, were regarded as a technical assignment of appellant's rights instead only as an instrument recognizing that an equitable assignment had taken effect, with the accompanying right of subrogation, it was an assignment *pendente lite*. The motion of appellees fails to recognize the fundamental difference between an assignment before suit and an assignment *pendente lite*. The recognition of such fundamental difference requires the denial of the motion.

"A *pendente lite* assignment carries with it an implied license by the assignor for the use of its name in the cause by the assignee to protect the rights assigned."

Ex Parte Railroad Co., 95 U. S. 221, 226.

In this case a defendant had assigned its interest in the litigation. It had made a claim for affirmative relief. Upon the decree being against the defendant which had assigned its claim its right to an appeal was denied on the ground that it had assigned its claim.

A writ of mandamus was granted requiring the court to allow the appeal. In the opinion the court said:

"The assignee may, at his own election, come in by an appropriate application, and make himself a party, so as to assume the burden of the litigation in his own name, or he may act in the name of his assignor."

"It is no defense to an action that, since the commencement of an action, it has been assigned, even where, under the statute, an assignee may sue in his own name. An assignment *pendente lite* does not render the assignee a necessary party. The action may be continued in the name of the assignor, under the control of the assignee, or by statute, in some states, an assignee *pendente lite* may be substituted in the place of the assignor."

5 Corpus Juris, p. 1006, Section 219.

"The assignor may not control the use of his name by the assignee; but on the contrary the assignee may use the name of the assignor without his consent and even over his objection, * * *."

5 Corpus Juris, p. 983.

"Since the suit by the assignee in the name of the assignor is for the benefit of the assignee and is subject to his control, it follows that the assignee will be bound by the judgment rendered."

5 Corpus Juris, p. 985.

"Where an assignment is made by plaintiff in an action after suit brought, the assignee acquires the right to control the action, and his rights as assignee will be protected. The assignment operates as an implied authority from the assignor to the assignee to use the assignor's name to protect the rights assigned; but there must be notice of the assignment to bind the debtor."

5 Corpus Juris, Sec. 181, p. 984.

"Generally speaking, an assignee, *pendente lite*, need not be made a party to a bill, or be brought before the court; for every person, purchasing, *pendente lite*, is treated as a purchaser with notice, and is subject to all the equities of the persons, under whom he claims in privity. And it will make no difference whether the assignee *pendente lite* be the claimant of a legal or an equitable interest, or whether he be the assignee of the plaintiffs or of the defendants."

Story's Equity Pleadings, 9th Ed. Sec. 156, p. 154.

"The thing in action may even be assigned while a suit upon it is pending, and, by the express provisions of the statute, the assignee may be either substituted as plaintiff or the suit may be carried on to its termination in the name of the original party. Such substitution, when made, is not the bringing of a new action, and does not require a supplemental complaint. If an assignee carries on a suit in *the* name of the assignor, he must show affirmatively that the transfer was made *pendente lite*."

Pomeroy's Code Remedies, Sec. 136.

"In my judgment the term 'prosecuted' is used in this section in the sense of 'commenced,' and does not prevent a party from assigning his interest in the subject matter of an action after it has been duly commenced, or require that the assignee shall make himself a party thereto, or dismiss the same and commence another action in his own name * * *. The statute is enabling rather than restrictive, and is intended to authorize an assignee of a chose in action to sue in his own name rather than to compel him to."

Hickox v. Elliott, 22 Fed. 13,19.

"* * * all actions must be prosecuted in the name of the real party in interest, except in cases where, *pendente lite*, he transfers his interest to another. In such a case the transfer does not operate to abate the action, and no order of substitution of parties is required."

Dundee Mortgage & Trust Investment Co. v. Hughes, 89 Fed. 182, 185.

In the same case at p. 285 the court said:

"In construing these sections of the code it has been held in this court that the word 'prosecuted,' as used in section 27, means 'commenced,' and that when an action has been commenced by the real party in interest, his subsequent transfer of such interest 'shall not abate the action, or prevent it prosecuting it to final judgment, or its being so prosecuted in his name for the benefit of whom it may concern.' *Elliott v. Teal*, 5 Sawyer, 188; Fed. Cas. No. 4396. See also *French v. Edwards*, 4 Sawyer, 128, Fed. Cas. No. 5097; *Moss v. Shear*, 30 Cal. 475; *Camarillo v. Fenlon*, 49 Cal. 203. There can be no doubt that the construction adopted by the court in *Elliott v. Teal* is the true one."

To the same effect are the following cases:

Walker v. Felt, 54 Cal. 386;

Jordan v. Ping, 32 Ia. 64;

Kreuger v. Sylvester, 100 Ia. 647;

Werner v. Hatton, 54 Kan. 250;

Hirshfeld v. Fitzgerald, 157 N. Y. 166;

Hegewisch v. Silver, 140 N. Y. 414.

"The right of the assignee to use the assignor's name cannot be objected to by the debtor. Whether the recovery is for the benefit of the legal plaintiff or of an assignee does not concern defendant, and he cannot object on the ground that another is beneficially entitled; * * *."

5 Corpus Juris, p. 983, Sec. 178.

"Whatever the rule may be in reference to the right of the assignee to cause an action *pendente lite* to be substituted in place of the assignor, he certainly has a right to have the action continued in the name of his assignor for his benefit. (20 Enc. Pl. & Prac. 1035; *Dundee Mortgage & Trust Inv. Co. v. Hughes*, 89 Fed. 182; *Elliott v. Teal*, Fed. Cas. No. 4389. And the courts will protect him against the assignor. *Walker v. Felt*, 54 Cal. 386.)"

King v. Miller, 53 Ore. 53;

Enc. Pl. & Pr., Vol. 20, p. 1033, Sec. 7.

The cases cited and relied upon by appellees are cases where assignments were made prior to the institution of the suits. They are not cases where assignments were made after judgment. The Power Company could not appeal from the decree against the plaintiff because it was not a party to the record. The appeal could be taken only by the appellant.

In the case at bar, inasmuch as the court dismissed the suit for want of jurisdiction in the court as a federal court, it necessarily follows that it could not have made an order allowing the company to be made a party to a suit which had already been dismissed. An appeal in equity is a continuation of the suit. The reimbursement of appellant by the company was not a technical assignment, but even if regarded as a technical assignment it was one made *pendente lite*. The appeal thereafter taken in the name of the plain-

tiff was therefore a continuation of the same suit, and it is a matter of no concern of appellees whether the appeal be carried on in the name of appellant or whether the company should move this court to allow it to be substituted in place of appellant.

Clark v. Mathewson, 12 Peters, 164;
Ex Parte Railroad Company, 95 U. S. 221;
Sykes v. Beck, 12 N. D. 242;
O'Neill v. Dougherty, 46 Cal. 576;
Anheier v. Fitnor, 8 N. D. 499;
Roszell v. Roszell, 105 Ind. 77;
Emerson v. Miller, 115 Ia. 315;
Belden v. Hurlbut, 94 Wis. 562.

Whether the appeal should be carried on in the name of the appellant or whether in this court there should be substitution is a matter within the discretion of this court.

In no sense is the question one of jurisdiction and the court certainly will not dismiss the appeal without first giving a party entitled to be substituted notice that substitution is required. If the court deems that there is any merit in the point of the appellees, then appellant asks that the company be substituted in its place or be joined with it in carrying on the appeal.

Gates v. Goodloe, 101 U. S. 612;
Bowden v. Johnson, 107 U. S. 251, 264.

In the case at bar the instrument executed by the Old Colony Trust Company to the company expressly authorized the company to prosecute all proceedings at law and in equity in the name of the Old Colony Trust Company or in its own name, so that in effect both parties are before this court. The controversy between these parties and the appellees has not been settled and there is, therefore, no foundation for the claim that there is no controversy.

III.

At pages 4 and 5 of the brief of appellees in support of the supplemental motion to dismiss, it is stated that the company on the 5th day of April, 1926, obtained a decree in its favor against the City of Seattle for the sum of three-fourths of the taxes upon the street railway property for the year 1919, with interest, and was awarded subrogation to the lien of such taxes. It is contended by appellees that because of the rendition of such decree this appeal should be dismissed. At page 5 the following language appears in the brief of appellees:

"Whatever may be the outcome of that decree on appeal, if appealed, it clearly appears that in so far

as the Puget Sound Power & Light Company is concerned it has no right to prosecute the case at bar in its own name or in the name of appellant herein."

This statement is hardly consistent with the argument that appellant has no right to prosecute this appeal because the Puget Sound Power & Light Company is an indispensable party to the appeal, being the real party in interest. The position, however, is manifestly unsound for the reason that the decree obtained by the company on the 5th of April, 1926, has not only not been satisfied in whole or in part, but has been appealed from, its appeal allowed and a supersedeas granted.

It is needless, therefore, to suggest or speculate as to what may happen if an appeal should be taken in that case when as a matter of fact an appeal was taken immediately upon the rendition of the decree (see appendix hereto) and among the thirty-one assignments of error filed by the city it is contended that the Old Colony Trust Company is a necessary party defendant and that the company is not entitled to recover in any proceeding either at law or in equity. It will be time enough, we submit, for appellees to avail themselves of the effect of such decree when they have paid it and satisfied it. The contention of appellees that the rendition of the decree in the District Court on the 5th day of April, 1926, from

which the City of Seattle has appealed, is any ground upon which to base a motion to dismiss the appeal in this case is, we submit, entirely without merit.

Illinois Central Railroad Co. v. Adams, 180 U. S. 28, 30.

Respectfully submitted,

JAMES B. HOWE,
HUGH A. TAIT,
EDGAR L. CRIDER,
Counsel for Appellant.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

PUGET SOUND POWER & LIGHT COMPANY, Plaintiff,

vs.

THE CITY OF SEATTLE, a municipal corporation, Defendant.

No. 404 IN EQUITY

ORDER ALLOWING APPEAL WITH SUPERSEDEAS

To the Honorable George M. Bourquin, District Judge:

The defendant in the above entitled cause having filed its Assignment of Errors, assigning errors in final decree rendered and entered by the Court on the 5th day of April, 1926; and after having filed such assignment of errors in the above entitled Court and having filed its petition for an appeal from such decree, and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit; it is on motion of the solicitors for the above named defendant

ORDERED that the appeal of the defendant to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of this Court, heretofore

filed and entered herein on the 5th day of April, 1926, be, and the same is hereby, allowed and that, on the execution of a bond in the sum of $5,000.00 with sufficient sureties to be conditioned as required by law, said appeal shall operate as a supersedeas of said decree and that a transcript of the record of all proceedings be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Seattle, Washington, April 5th, 1926.

BOURQUIN,
Judge.

The foregoing is a full, true and correct copy of an original order made on the 5th day of April, 1926.

WITNESS my hand and official seal this 29th day of April, 1926.

ED. M. LAKIN,
Clerk.
By S. McH. COOK,
Deputy.

FILED
DEC 3 192
WM. R. STANSB
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In the

Supreme Court of the United States

OCTOBER TERM, 1925

No. 194

OLD COLONY TRUST COMPANY, as Trustee,
Appellant

vs.

THE CITY OF SEATTLE, COUNTY OF KING, W. W. SHIELDS, as Treasurer, and MATT STARWICH, as Sheriff, of King County,
Appellees

BRIEF OF APPELLANT AND AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS APPEAL

JAMES B. HOWE
HUGH A. TAIT
EDGAR L. CRIDER
Counsel for Appellant

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MAIN 2279

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No. 194

OLD COLONY TRUST COMPANY, as Trustee,
Appellant

vs.

THE CITY OF SEATTLE, COUNTY OF KING, W. W. SHIELDS, as Treasurer, and MATT STARWICH, as Sheriff, of King County,
Appellees

BRIEF OF APPELLANT AND AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS APPEAL

STATEMENT OF CASE.

This case is here upon direct appeal from a decree of the District Court of the United States for the Western District of Washington dismissing appellant's suit against appellees upon the sole ground of want of jurisdiction in that court as a federal court to entertain the suit because prohibited from so doing

by the Eleventh Amendment to the Constitution of the United States. (Rec. 20-25.)

The appeal was taken and allowed upon the question of jurisdiction only of the District Court as a federal court because so prohibited, and the proper certificate of the jurisdictional question was out of abundance of caution duly preserved. (R. 22-25.)

The only question upon this appeal is:

"Did the District Court err in entering its decree dismissing the suit for want of jurisdiction as a federal court to entertain the suit?"

All other questions relate to the merits and not to the jurisdiction of the court as a federal court.

Male v. Atchison, Topeka & Santa Fe Railroad Co., 240 U. S. 97.

The bill of appellant, after alleging diversity of citizenship of the parties and the existence of the amount requisite for jurisdictional purposes, in substance alleged: that appellees had combined upon a fraudulent scheme whereby, through fraud and collusion, they would cause the illegal seizure and sale of property, on which all taxes had been paid, covered by a mortgage executed to appellant by Puget Sound Power & Light Company, a Massachusetts corporation, to secure the holders of notes of the Power Company amounting to millions of dollars and apply the

proceeds of such sale to the payment of the tax liens upon the street railway property of the city, which the city assumed and agreed to pay when it purchased the street railway property from the company, in order fraudulently to free and discharge the street railway property of the city from such tax liens and the city from the obligation to pay the same. (R. 1-15.) Appellant's bill was not filed to enjoin the collection of any taxes or of any tax. No relief was sought by appellant to prevent appellees from collecting the taxes from the City of Seattle or enforcing their collection from the street railway property upon which they were valid specific liens. What the bill sought to prevent was a collusive, fraudulent and confiscatory seizure and sale of appellant's trust property and the application of the proceeds of sale to the payment of the adjudicated tax liens upon the street railway property of the city which the city had assumed and agreed to pay. The conduct of appellees should be considered in the light of the following cases.

Puget Sound Power & Light Company v. King County et al., 264 U. S. 22;

Puget Sound Power & Light Company v. King County et al., 117 Wash. 351, 353, 358;

Puget Sound Power & Light Company v. Seattle et al., 5 Fed. (2d) 393;

Twichell v. Seattle et al., 106 Wash. 32.

Since the filing of appellant's brief upon the appeal appellees have moved to dismiss the appeal upon two grounds, namely:

1. **That the appeal presents only a moot question.**

2. **That the appeal is frivolous.**

We will consider these contentions of appellees in their inverse order:

1. The appeal is not only not frivolous, but is so well founded as to require the reversal of the decree appealed from.

It is not clear upon what theory it can be contended that an appeal to this court from a decree of a District Court of the United States dismissing a suit for want of jurisdiction in the District Court as a federal court because prohibited from entertaining the suit by the Eleventh Amendment to the Constitution, is frivolous, where the amount involved is sufficient, the requisite diversity of citizenship exists, and where the state is not a party to the suit, does not seek to participate in the fraud charged and would suffer no loss if such fraud were prevented. It is claimed, however, by appellees that the state had an interest in the taxes upon the street railway property and therefore appellant had no right to institute suit in the federal court to enjoin the seizure and

sale of the trust property of appellant to satisfy the taxes upon the street railway property, because the proceeds of sale of the trust property would be paid over by the sheriff to the county treasurer and by the county treasurer a part would be paid to the state.

The complaint alleged that the taxes upon the street railway property were levied for state, county, school district and city purposes, and that the principal of the city taxes alone amounted to the sum of $179,-365.76. (R. 3.) The county treasurer was *ex-officio* collector of city taxes. He likewise collected all other taxes. The taxes collected by him or by the sheriff under the distress warrant issued by the treasurer would all be paid into the county treasury and by the treasurer be paid over,—*the city taxes to the city*, the tax for state purposes to the state treasurer, and the *county tax* and school district tax *retained in the county treasury of the county.* The state had no interest whatsoever in the city tax or in the county tax or in the school district tax, and it certainly had no interest in coercing appellant into paying taxes upon the street railway property of the city in order to prevent the sale of the mortgaged property of appellant and the application of the proceeds of such sale to discharging the obligation of the city and the freeing of the city's property from the lien of the taxes thereon.

Under the following cases it is clear that the remote interest of the state in the amount of the several taxes upon the street railway property was not such an interest as made the state a necessary party to the suit against appellees to prevent the fraudulent seizure and sale of appellant's property, and the Eleventh Amendment to the Constitution was no bar to the full exercise of federal jurisdiction invoked by appellant.

Illinois Central R. R. v. Adams, 180 U. S. 28, 37;

Port of Seattle v. Oregon & Washington Railroad, 255 U. S. 56, 71;

Lincoln County v. Luning, 133 U. S. 529;

Chicot County v. Sherwood, 148 U. S. 529;

Hopkins v. Clemson Agricultural College, 221 U. S. 636;

Rolston v. Missouri Fund Commissioners, 120 U.S. 390, 411;

Johnson v. Lankford, 245 U. S. 541, 545;

Puget Sound Power & Light Company v. Seattle et al., 5 Fed. (2d) 393, 397.

In the case last cited, which was the companion case to the case at bar and involved the suit of the company to protect its rights, the court of appeals said:

"It was not a suit to enjoin the payment of a tax and was in no sense a suit against the state. Clifford v. Miller, 288 Fed. 537."

In the case at bar the District Court did not decree that appellant's bill and supplemental bill did not state a case within the equity jurisdiction of the court; neither did it decree that appellant's remedy was by action at law; nor did it decree that appellant had no ground for suit or action. What it did decree was that it was without jurisdiction as a federal court to entertain the suit to hear and determine any of those questions by reason of the Eleventh Amendment to the Constitution of the United States, and on the sole ground of lack of jurisdiction as a federal court it dismissed the suit without prejudice. (R. 20-25.)

That a suit against individuals acting fraudulently and in violation of law is not a suit against the state or one in which the state has any such interest as prevents the District Court as a federal court from entertaining jurisdiction, is well settled.

Allen v. Baltimore & Ohio R. R., 114 U. S. 311;

Board of Liquidation et al. v. McComb, 92 U. S. 531, 541;

Pennoyer v. McConnaughy, 140 U. S. 1, 10;

Clifford v. Miller, 288 Fed. 537;

Welland v. Pioneer Irrigation Co., 238 Fed. 519;

Ex Parte Young, 209 U. S. 123;

Weyman-Bruton Co. v. Nash, 231 Fed. 898;

Bromwell B. & W. Co. v. State Board, 279 Fed. 440, 442, 443, 444;

Ludwig v. Western Union Tel. Co., 216 U. S. 146;

Western Union Tel. Co. v. Andrews, 216 U. S. 165;

Scott v. Donald, 165 U. S. 58, 67, 68-70;

In re Tyler, 149 U. S. 164;

Tyler v. Dane County, 289 Fed. 843, 847;

In re Ayers, 123 U. S. 443, 500, 501.

That the seizure of the mortgaged property to impose by such seizure a lien thereon paramount to the mortgage, and to sell the mortgaged property to pay the taxes constituting a specific lien upon the street railway property and thereby discharge the street railway property from such lien and the city from its obligation to pay them, was both fraudulent and illegal.

Goodsell v. Spokane County, 238 Pac. 612, (Decided August 26, 1925, not yet officially reported);

Minshull v. Douglas County, 133 Wash. 650, 653;

Pennington v. Yakima County, 127 Wash. 538;

Wilberg v. Yakima County, 132 Wash. 219, 220;

Mills v. Thurston County, 16 Wash. 378;

Lewis Construction Co. v. King County, 60 Wash. 694;

Western Electric Co. v. Norway Pacific Co., 126 Wash. 204;

Scandinavian American Bank v. King County, 92 Wash. 650;

Thompson v. National Bank of Redemption, 106 Mass. 130;

Stirling v. Forrester, 3 Bligh. 575, 590, (House of Lords Case);

Story's Eq. Jur., (12th Ed.) Sec. 493;

Wells Fargo Co. v. Taylor, 254 U. S. 175.

We do not cite these cases for the purpose of asking a decision upon questions not decided by the District Court, but for the purpose of demonstrating that the state was in no way so interested in the illegal and fraudulent acts of appellees as to deprive appellant of the right to sue appellees in the District Court of the United States to have such questions determined against them. It would have been of no benefit to appellant to have filed an amended and supplemental bill after the payment on June 7, 1924, when the District Court had held that it had no jurisdiction as a federal court to entertain the suit of ap-

pellant for any relief in respect to the matters alleged in its original complaint and its former supplemental complaint.

That appellees have confused the question of the jurisdiction of the court as a federal court with the question of jurisdiction, in equity or at law, plainly appears from the following statements in their brief:

"The district court as a federal court was without jurisdiction under Section 267 of the Judicial Code because appellant had a plain, adequate and complete remedy at law." (p. 13.)

"The district court as a federal court was without jurisdiction because no special circumstances are alleged to bring the case under some recognized heading of equity jurisdiction.' (p. 17.)

The following cases conclusively refute such claims.

Smythe et al. v. Asphalt Belt Ry., 267 U. S. 326;

Woodmen of the World v. O'Neill, 266 U. S. 292, 295, 298;

The Carlo Poma, 255 U. S. 219;

Hoffman v. McClelland, 264 U. S. 552, 557;

Oliver Company v. Mexico, 264 U. S. 440;

Binderup v. Pathe Exchange, 263 U. S. 291, 305;

The Pesaro, 255 U. S. 216;

DeRees v. Costaguta, 254 U. S. 166, 173;

Bogart v. Southern Pacific Co., 228 U. S. 137, 144, 145;

Public Service Company v. Carboy, 250 U. S. 153, 159;

Smith v. Apple, 264 U. S. 274;

Chappell v. United States, 160 U. S. 499, 508;

Smith v. McKay, 161 U. S. 355, 357;

Louisville Trust Company v. Knoti, 191 U. S. 225, 235.

2. The case is not a moot case as contended by appellees.

At page 6 of their brief appellees present the following ground for dismissing the appeal:

"That because the taxes have been paid there is now no actual controversy involving real and substantial rights between appellant and these appellees and as to them no subject matter upon which the judgment of this court can operate.

"The controversy is ended and the question is moot. The tax has been paid."

The suit, as before stated, was instituted by appellant as Trustee for note holders of notes of Puget Sound Power & Light Company, hereinafter referred to as the "company," under a mortgage securing such notes covering property on which all taxes had been paid, to restrain appellees from consummating a fraudulent scheme which they had entered into to accomplish. The scheme was that the City of Seattle, hereinafter referred to as the "city," should refuse to pay the delinquent taxes on its street rail-

way property which when it purchased from the company in 1919 it assumed and agreed to pay and which were thereafter adjudicated to be valid liens thereon.

Puget Sound Power & Light Company v. King County et al., 264 U. S. 22;

Puget Sound Power & Light Company v. King County et al., 117 Wash. 351, 353, 358;

Puget Sound Power & Light Company v. Seattle et al., 5 Fed. (2d) 393;

Twichell v. Seattle et al., 106 Wash. 32.

That the appellees, thereafter acting in collusion should, under a distress warrant issued for the collection of such delinquent taxes upon the street railway property of the city, refuse to collect such taxes from the city or the street railway property and instead thereof should seize and sell the property covered by appellant's trust mortgage for the purpose of compelling such property to pay the taxes upon the street railway property which the city had assumed and argeed to pay and thereby release and discharge the city and its street railway property from the obligation to pay any portion of the taxes which had been adjudicated to be valid liens upon such property. (R. 1 through 15.)

The bill did not seek to restrain the collection of any tax. It sought to prevent trust property on which all taxes had been paid from being fraudulently seized and sold to pay taxes constituting adjudicated liens upon the street railway property which the city had agreed to pay. The bill prayed both a temporary and a permanent injunction restraining appellees from so acting.

After the filing of the bill and the service of process upon the county, its treasurer, its sheriff and the city comptroller, the sheriff under the distress warrant for the collection of the taxes upon the street railway property, instead of making any attempt to collect the taxes from the city or from the street railway property, although the street railway property was easily accessible and was producing millions of dollars revenue annually, and although the city and county offices were in the same building, seized the property covered by appellant's mortgage and advertised for sale, not the right, title and interest of the mortgagor, but the mortgaged property to pay the delinquent taxes upon the street railway property. Appellant then by leave of court filed its supplemental bill, alleging such seizure by the sheriff after the service of process; that the sheriff had refused to permit the payment of any single tax with

interest and costs unless payment should be made of each and every tax with interest and costs, including the tax levied by the City of Seattle upon its own street railway property. (R. 9-15.)

Cooley, Taxation (3rd Ed.), page 808;
Central Pacific Co. v. Gage, 96 Oregon 192;
Appellant's Brief on Appeal, 20-21.

Appellant, in its supplemental bill, offered to pay any portion of the taxes upon the street railway property which the company ought to pay if the company should fail to pay the same, and prayed that the sheriff be required to resort for the satisfaction of the taxes upon the street railway property to that property, and that in the event of appellant paying any portion of such taxes which the city ought to pay it should be granted subrogation and the city decreed to repay to appellant the amount so paid. (R. 15.)

As before stated, the principal of the city tax alone was $179,365.76. The interest thereon was at the rate of 15 per cent per annum from March 15, 1920, and the county treasurer and the sheriff, in collecting that amount, were the agents of the city.

Sections 11319-11323, Remington's Compiled Statutes of Washington, 1922;

Appendix to Appellant's Brief on Appeal, pp. 25-27.

On June 7, 1924, the court having denied appellant's temporary injunction prayed for in its original and supplemental bills (R. 37), and the mortgaged property being advertised for sale on June 10, 1924, the amount claimed by the sheriff before he would release the mortgaged property from seizure under the distress warrant to pay the taxes upon the street railway property, was paid in order to obtain such release.

The foregoing extended statement has been made for the purpose, and we hope that therefore the repetition will be pardoned, of enabling the court to consider and deal with the motion to dismiss on the ground that the case has become moot, in the light of what is hereinafter set forth. The foregoing facts being admitted to be true by the motions to dismiss filed by appellees in the District Court and the District Court having held that the Eleventh Amendment prevented it as a federal court from entertaining the suit, and appellees still maintaining their alliance for the fraudulent consummation of the scheme to extinguish the obligation of the city and free its property from adjudicated liens thereon by confiscating the money paid to obtain the release before mentioned, on the theory that confiscation has been so far accomplished that the question of the jurisdic-

tion of the court has become moot, join in moving the dismissal of the appeal to determine the question whether the District Court erred in dismissing the suit for want of jurisdiction as a federal court to entertain the same.

In support of their contention that the case is a moot case by reason of the payment of the amount which was paid in order to obtain the release of the mortgaged property, appellees submit to the court three affidavits and a photographic copy of the check delivered to the sheriff. As the object of the affidavits and photograph is to convince the court that the case is moot as to appellant, mortgagee trustee, because voluntary payment was made by the mortgagor, we submit that in common fairness to the court and to appellant appellees should have submitted along with the photograph and affidavits a photographic or other copy of the notice hereinafter set forth, which on the 7th day of June, 1924, in the office of the county treasurer, and just before the delivery of the check to the sheriff, was served upon the sheriff in the presence of his counsel and of the county treasurer, and in the same presence receipt of such notice was in writing acknowledged by the sheriff; that such was the fact is shown by the affi-

davit of William E. Best which, together with a copy of such notice and receipt attached thereto, has been filed in this court and a copy set forth in the appendix to this brief. The notice and receipt are as follows:

"Seattle, June 7, 1924.

"To Matt Starwich,
Sheriff of King County,
Seattle, Washington.

YOU WILL PLEASE TAKE NOTICE:

"1. That Puget Sound Power & Light Company and Old Colony Trust Company, Trustee under the mortgage from Puget Sound Power & Light Company to Old Colony Trust Company, Trustee, covering the property levied upon by you to satisfy state, county, school district and city taxes for the year 1919 upon the street railway lines, with interest thereon at the rate of 15% per annum from March 15, 1920, claim that such levy is arbitrary and coercive and was intended to compel Puget Sound Power & Light Company and Old Colony Trust Company as Trustee to pay taxes held valid liens upon the street railway lines of the City of Seattle sold by the company to the city on March 31, 1919, three-fourths of which taxes the city bound itself to pay and which contract was held valid by the Supreme Court of the State of Washington.

"2. That your action pursuant to an agreement between certain city officials and certain county offi-

cials to seize the property of the company covered by the lien of the mortgage to the Old Colony Trust Company, in order to collect the taxes upon the street railway lines, instead of seizing the street railway lines of the city, decreed by the Supreme Court of the state to be subject to the liens of such taxes, was also arbitrary and an abuse of legal process and was intended by you and said city and county officials to force the collection of such taxes upon the street railway lines from property of the company upon which it had paid all of its taxes for the year 1919 instead of from the street railway lines.

"3. You are hereby further notified that Old Colony Trust Company, Trustee, Mortgagee, and Puget Sound Power & Light Company herewith and by reason of such coercive and arbitrary action pay, under protest, the full amount of such taxes with interest and costs, for the purpose of obtaining the release of their property from the levy made by you, and claim the right to be subrogated to the lien of each and every such tax with interest thereon at the rate of 15% per anum from March 15, 1920, upon the street railway lines of the City of Seattle described in the notice of distraint in your possession and upon which street railway lines you refused to levy to satisfy such taxes and instead thereof levied upon the property of the company described in your notice of sale, which property you well knew was subject to the lien of the mortgage of Old Colony Trust Company, Trustee.

"This payment is made under protest and compulsion and Puget Sound Power & Light Company

and Old Colony Trust Company as Trustee, reserve all legal and equitable rights against you, the County of King and the City of Seattle.

Respectfully,

PUGET SOUND POWER & LIGHT COMPANY,
By James B. Howe,
Its Solicitor.

OLD COLONY TRUST COMPANY, Trustee,
By James B. Howe,
Its Solicitor.

"Received the above before payment under protest.
June 7th, 1924. MATT STARWICH,
Sheriff King Co."

To present to this court the photographic copy of the check and to make no reference in the affidavits to the facts and circumstances under which the check was delivered under protest to the sheriff and that the sheriff had received the money under the notice given by appellant and its mortgagor while both cases were pending, was a statement of only a half truth. If the photograph had shown the notice, the acknowledgment of service by the sheriff and the check delivered pursuant to the notice, with counsel whose affidavit supports the motion to dismiss present and witnessing the entire transaction, it would have been more true to life. If half the truth would entitle the motion to consideration the whole truth requires

its denial. After payment so made *pendente lite* in each case, each plaintiff would be entitled to such decree in each case as a court of equity should determine, whether by way of subrogation or restoration.

A case cannot be moot where any right, other than for costs alone, exists upon which a decree can operate.

Ward v. Love County, 253 U. S. 17, 20, 23, 24;

Atchison, Topeka & Santa Fe Ry. v. O'Connor, 223 U. S. 280, 287;

Erskine v. Van Arsdale, 15 Wall. 75;

Virginia Coupon Cases, 114 U. S. 270;

Tyler v. Dane County, 289 Fed. 843, 847;

Elliott v. Swartout, 10 Peters, 137.

O'Hara v. MacConnell, 93 U. S. 150, 154.

Erwin v. Lowry, 7 How. 184.

In the case at bar the payment made to release the mortgaged property from the levy was made while the case of appellant and the case of the company were both pending. Appellees, by enforcing payment under duress during the pendency of the case did so at their peril.

"No doubt after the filing of a bill for an injunction defendants proceed at their peril, even though no injunction is issued, and if they go on to inflict an actionable wrong upon the plaintiff will not be

allowed to defeat the jurisdiction of the court by their own act."

Wingert v. First National Bank, 223 U. S. 670, 672.

We ask that appellant's brief on appeal be considered herewith and submit that the claim that the appeal presents only a moot question is wholly without foundation, both in law and in fact, and that the motion to dismiss should be denied.

Respectfully submitted,

JAMES B. HOWE,
HUGH A. TAIT,
EDGAR L. CRIDER,
Counsel for Appellant.

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1925

No. 194

OLD COLONY TRUST COMPANY, as Trustee, Appellant,

vs.

THE CITY OF SEATTLE, COUNTY OF KING, W. W. SHIELDS, as Treasurer, and MATT STARWICH, as Sheriff, of King County, Appellees.

Affidavit of William E. Best

State of Washington } ss.
County of King }

WILLIAM E. BEST, being first duly sworn, on oath deposes and says:

I am a citizen and resident of the City of Seattle, State of Washington, and over the age of twenty-one years. For a number of years past I have been Assistant Treasurer of Puget Sound Power & Light Company. I am, to a certain extent, familiar with the litigation in the above entitled case and also in the case of Puget Sound Power & Light Company v.

The City of Seattle et al., decided by the United States Circuit Court of Appeals in 5 Federal (2nd) 393.

In June, 1924, after the District Court of the United States had denied in each of the cases a temporary injunction to restrain the sale of the property covered by appellant's mortgage, I, in company with James B. Howe, counsel for the plaintiff in each case, proceeded to meet the sheriff for the purpose of delivering to him the amount for which he had levied upon the mortgaged property under a distress warrant for the collection of taxes for the year 1919 upon the street railway property of the City of Seattle, a portion of which taxes the city in its contract with Puget Sound Power & Light Company had assumed and agreed to pay. On the 7th of June, 1924, in the office of the county treasurer and in the presence of the sheriff and counsel for the sheriff and county treasurer, and before the delivery of the check, a photographic copy of which is set forth in the brief of appellees in the above entitled case, counsel for appellant and Puget Sound Power & Light Company delivered to the sheriff a copy or duplicate original of the notice, a copy of which is hereto attached. Such notice was also handed to counsel for the sheriff and the sheriff acknowledged receipt of such notice as the same appears on the copy hereto attached. The delivery of such notice and the receipt therefor were made immediately before the delivery of the check and either a duplicate original or copy of the notice was retained by the sheriff or his counsel.

At that time there were several other persons present and two cameras were in the room.

WILLIAM E. BEST.

Subscribed and sworn to before me this 20th day of November, 1925.

(Notarial Seal) EDGAR L. CRIDER,
Notary Public in and for the State of Washington, residing at Seattle.

Seattle, June 7, 1924.

To Matt Starwich,
Sheriff of King County,
Seattle, Washington.

YOU WILL PLEASE TAKE NOTICE:

1. That Puget Sound Power & Light Company and Old Colony Trust Company, Trustee under the mortgage from Puget Sound Power & Light Company to Old Colony Trust Company, Trustee, covering the property levied upon by you to satisfy state, county, school district and city taxes for the year 1919 upon the street railway lines, with interest thereon at the rate of 15% per annum from March 15, 1920, claim that such levy is arbitrary and coercive and was intended to compel Puget Sound Power & Light Company and Old Colony Trust Company as Trustee to pay taxes held valid liens upon the street railway lines of the City of Seattle sold by the company to the city on March 31, 1919, three-fourths of which taxes the city bound itself to pay and which contract was held valid by the Supreme Court of the State of Washington.

2. That your action pursuant to an agreement between certain city officials and certain county officials to seize the property of the company covered by the lien of the mortgage to the Old Colony Trust Company, in order to collect the taxes upon the street railway lines, instead of seizing the street railway lines of the city, decreed by the Supreme Court of the state to be subject to the liens of such taxes, was also arbitrary and an abuse of legal process and was intended by you and said city and county officials to force the collection of such taxes upon the street railway lines from property of the company upon which it had paid all of its taxes for the year 1919 instead of from the street railway lines.

3. You are hereby further notified that Old Colony Trust Company, Trustee, Mortgagee, and Puget Sound Power & Light Company herewith and by reason of such coercive and abritrary action pay, under protest, the full amount of such taxes with interest and costs, for the purpose of obtaining the release of their property from the levy made by you, and claim the right to be subrogated to the lien of each and every such tax with interest thereon at the rate of 15% per annum from March 15, 1920, upon the street railway lines of the City of Seattle described in the notice of distraint in your possession and upon which street railway lines you refused to levy to satisfy such taxes and instead thereof levied upon the property of the company described in your notice of sale, which property you well knew was subject to the lien of the mortgage of Old Colony Trust Company, Trustee.

This payment is made under protest and compulsion and Puget Sound Power & Light Company

and Old Colony Trust Company as Trustee, reserve all legal and equitable rights against you, the County of King and the City of Seattle.

Respectfully,

PUGET SOUND POWER & LIGHT COMPANY,

By James B. Howe,
Its Solicitor.

OLD COLONY TRUST COMPANY, Trustee,

By James B. Howe,
Its Solicitor.

Received the above before payment under protest.

MATT STARWICH,
Sheriff King Co.

June 7th, 1924.

Office Supreme
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WM. R. ST

In the

Supreme Court of the United States

OCTOBER TERM, 1925

No. 194

OLD COLONY TRUST COMPANY, as Trustee,
Appellant

vs.

THE CITY OF SEATTLE, COUNTY OF KING, W. W. SHIELDS, as Treasurer, and MATT STARWICH, as Sheriff, of King County,
Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

Brief of Appellant

JAMES B. HOWE
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No. 194

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vs.

THE CITY OF SEATTLE, COUNTY OF KING, W. W. SHIELDS, as Treasurer, and MATT STARWICH, as Sheriff, of King County,
Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

Brief of Appellant

(Italics are Counsels' unless otherwise stated.)

STATEMENT

This appeal is from a decree of the District Court of the United States for the Western District of Washington, dated June 26, 1924, dismissing appellant's suit against appellees on the sole ground of

want of jurisdiction in the district court as a federal court because prohibited from exercising such jurisdiction by the Eleventh Amendment to the Constitution of the United States. (R. 20-25.)

The suit was dismissed on motion prior to answer. (R. 20.) The relevant facts well pleaded in the original and supplemental bills were therefore admitted. The requisite diversity of citizenship existed, appellant being a corporation created under the laws of the State of Massachusetts and appellees being two municipal corporations created under the laws of the State of Washington and two individual citizens and residents of Washington, both being officers of King County and one *ex-officio* collector of city taxes for the City of Seattle. (R. 2.) The amount involved exceeded the jurisdictional requirement. The principal of the city tax alone was $179,365.76. (R. 3.)

The suit was instituted by appellant as mortgagee trustee to prevent appellees, by fraud and collusion and in violation of the laws of the state, committing a threatened tort which if consummated would create a cloud upon the title to the property covered by such mortgage executed to appellant as trustee by Puget Sound Power & Light Company; dissipate the trust property used in serving the public and cause irreparable damage to appellant and the beneficiaries of the trust. (R. 1-6.)

Appellant assigned error in the decree (R. 1-6, 10-15) in dismissing the suit for want of federal jurisdiction; appealed directly to this court, obtained an order allowing its appeal stating that the suit was dismissed for want of jurisdiction in the district court as a federal court and duly preserved the jurisdictional question by the proper certificate. (R. 21-25.)

Statement of Facts

The tort which the bill alleged appellees combined to commit and were threatening to accomplish when the original bill was filed was the illegal repudiation by the city of its obligation to pay to its co-defendants its stipulated portion of the taxes upon the street railway property for the year 1919 which the city by its contract of purchase with Puget Sound Light & Power Company, a Massachusetts corporation, hereinafter designated "company," assumed and agreed to pay and which had been adjudicated by this Court and the Supreme Court of the state to be valid liens thereon; the fraudulent, arbitrary and illegal refusal of the other appellees to enforce such liens upon the street railway property or against the city and instead the fraudulent, arbitrary and illegal distraint by them of the property covered by appellant's mortgage on which all taxes had been paid; the threatened

sale of the same and the illegal application of the proceeds of sale to the extinguishment of the adjudicated tax liens upon the street railway property in order that the city and its street railway property should thereby escape their adjudicated obligations. (R. 1-6.)

The contract of purchase between the company and the city contained the following provision:

"That state, county and municipal taxes levied against the property for the year 1919 shall be paid, before the same shall become delinquent, by the respective parties hereto, in amounts proportional to the respective periods of time that said parties are respectively in possession of said property during the year 1919." (R. p. 3.)

The contract was held valid by the Supreme Court of the state. (R. p. 2.) (*Twichell et al. v. Seattle et al.*, 106 Wash. 32.) The instrument conveying the street railway property to the city contained the following provision:

"It is also further agreed between the parties hereto that if at the time of the delivery of this deed any lien shall have attached to the property or any part thereof, for the year 1919, for any tax for the year 1919, such lien shall not constitute a breach of warranty and that if such tax shall become collectible the same shall be paid before the same shall become delinquent by the respective parties hereto in the amounts proportionate to the respective periods of

time that said parties are respectively in possession of said property during the year 1919." (R. 3.)

The city was in possession three-fourths of the year 1919 and the company one-fourth. (R. 3.) The taxes for the year 1919 were adjudicated to be valid liens on the property when purchased by the city. (R. 5.)

Puget Sound Power & Light Company v. King County et al., 264 U. S. 22;

Puget Sound Power & Light Company v. King County et al., 117 Wash. 353;

Puget Sound Power & Light Company v. Seattle et al., Fed. R. Vol. 5 (2d) 393.

As a part of the scheme entered into by the appellees the County Treasurer refused to allow the company, mortgagor, to pay any portion of the taxes upon the street railway property less than the whole amount of all of the taxes with interest thereon. (R. 4.) After the filing of the bill and the service of process and before the application for the temporary injunction prayed for in the bill could be heard, the Sheriff made demand upon the company for the payment of the full amount of each and all of the taxes with interest and costs. He refused to allow the company to pay any single tax with interest and costs and refused to allow the company to pay any lesser sum than the full amount of all of the taxes with interest and costs. He then instead of distraining the

street railway property to satisfy the taxes thereon, distrained the mortgaged property covered by the appellant's mortgage and advertised the same for sale to satisfy the taxes upon the street railway property. (R. 12.) Appellant having applied to the court for leave to file a supplemental bill, filed such supplemental bill in which it alleged the action of the Sheriff since the institution of the suit, the refusal of the Sheriff to accept from the company payment of any of the taxes with interest thereon and costs less than the full amount of all taxes with interest and costs and the distraint and threatened sale by the Sheriff of the property mortgaged to appellant, trustee, as security for the payment of obligations issued by the company and outstanding in the hands of the public. It also alleged that such property was used in serving the public and that if the Sheriff were not restrained from selling it the mortgaged property would be dissipated; the security of appellant impaired and appellant and the beneficiaries of the mortgage security irreparably injured and damaged. It also alleged the willingness of the appellant to pay any portion of the taxes which the court should decree it or the company should pay and prayed that if compelled to make payment to protect its security it should be decreed subrogation. (R. 10-15.) Appellees moved to dismiss and the court upon hearing such motion

dismissed the suit for want of jurisdiction in the court as a federal court because of the prohibition contained in the Eleventh Amendment. (R. 20.)

Specifications of Error

Appellant for the reversal of the decree appealed from specifies and relies upon the following errors therein:

1. Dismissing the suit for want of jurisdiction in the court as a federal court.

2. In holding that the Eleventh Amendment to the Constitution of the United States prohibited the court from exercising federal jurisdiction in the suit.

3. In holding that four separate and distinct taxes for State, County, School District and City purposes could by appellees be consolidated in a lump sum and thereby the indirect interest of the state in one tax for state purposes deprive the court of federal jurisdiction in respect to the other taxes.

Argument

The District Court erred in holding that the State of Washington had any such interest in the suit as made the Eleventh Amendment to the Constitution of the United States applicable and deprived the District Court of jurisdiction as a federal court. (Specifications 1, 2.)

Neither the state nor any state officer was a party. The suit was by a Massachusetts corporation against two Washington municipal corporations and two resident citizens of Washington, officers of such corporations. The object of the suit was the prevention of irreparable damage to appellant through the fraudulent and collusive acts of appellees in violation of the law of the state. Appellant's controversy was not with the state. It was with appellees. If their acts were authorized by the state they could show such authority as a defense upon the merits. Neither the existence or nonexistence of authority presents a question of federal jurisdiction. The determination of such question is one involving the merits. Where the requisite diversity of citizenship exists and the amount involved is sufficient federal jurisdiction exists to determine whether the acts of appellees were lawful or unlawful. The only color for claiming that the state had even an indirect interest in the suit

was the fact that if the taxes upon the street railway property should be collected the Sheriff would pay such amount to the County Treasurer and he would pay a portion into the state treasury and the remainder to the County of King, School District No. 1 and the City of Seattle. Neither the original nor the amended bill sought any relief against the state or any state officer, nor did it seek to enjoin the collection of any tax upon the street railway property. The Eleventh Amendment therefore did not apply.

"Immunity from suit is a high attribute of sovereignty—a prerogative of the state itself—which cannot be availed of by public agents when sued for their own torts. The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the state's citizens."

> *Hopkins v. Clemson College*, 221 U. S. 636, 642, 643.

The following language of this court is quite applicable to the case at bar:

"The sole question for our consideration then, is whether the cause of action stated is one against the state of which the district court has no jurisdiction. There is certainly no assertion of state action or liability upon the part of the state, and no relief is prayed against it. *The charges are all against Lankford.* The relief sought *is against him* because of his wilful or negligent *disregard of the laws of the state.*

"We think the question, therefore, should be answered in the negative; that is, *the action is not one against the state.* To answer it otherwise would be to assert, we think, that whatever an officer does, even in contravention of the laws of the state, is state action, identifies him with it and makes the redress sought against him a claim against the state and therefore prohibited by the Eleventh Amendment. Surely, an officer of a state may be delinquent without involving the state in delinquency; indeed, may injure the state by delinquency as well as some resident of the state, and be amenable to both."

Johnson v. Lankford, 245 U. S. 541, 545.

"The thing prohibited by the Eleventh Amendment is the exercise of jurisdiction in a 'suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.' Nothing else is touched; and suits between individuals, unless the state is a party, in a substantial sense, are left untouched, no matter how much their determination may incidentally and consequentially affect the interests of a state, or the operations of its government."

Poindexter v. Greenhow, 114 U. S. 270, 297;

Port of Seattle v. Oregon & W. R. R., 255 U. S. 56, 71;

Lincoln County v. Luning, 133 U. S. 529;

Tindall v. Wesley, 167 U. S. 204.

"It is next contended that this suit cannot be maintained because it is in effect a suit against the state, which is prohibited by the Eleventh Amendment to

the Constitution of the United States, and Louisiana v. Jumel, 107 U. S. 711, is cited in support of this position, but this case is entirely different from that. There the effort was to compel a state officer to do what a statute *prohibited him from doing.* Here the suit is to get a state officer to do what a statute requires of him. The litigation is with *the officer, not* with the *state.*"

> *Rolston v. Missouri Fund Commrs.*, 120 U .S. 390, 411.

In the case at bar the suit was to restrain two *municipal corporations* and *their officers* from *violating* the *law* of the *state to the irreparable injury of* appellant.

A suit against an individual who is an officer, to restrain him from violating a statute of a state and thereby causing irreparable damage, is no more a suit against the state than one to restrain him from doing an act under a state statute which violates the Constitution of the United States. In neither case is the suit against the state. In each it is against the individual for his tortious act.

> *Allen v. Baltimore & Ohio R. R. Co.*, 114 U. S. 311;
>
> *Board of Liquidation et al. v. McComb*, 92 U. S. 531, 541;
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> *Pennoyer v. McConnaughy*, 140 U. S. 1, 10;
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> *Clifford v. Miller*, 288 Fed. 537;

Weiland v. Pioneer Irrigation Co., 238 Fed. 519;

Ex parte Young, 209 U. S. 123;

Weyman-Bruton Co. v. Nash., 231 Fed. 898;

Bromwell B. & W. G. Co. v. State Board, 279 Fed. 440, 442, 443, 444;

Ludwig v. Western Union Tel. Co., 216 U. S. 146;

Western Union Tel. Co. v. Andrews, 216 U. S. 165;

Scott v. Donald, 165 U. S. 58, 67, 68-70;

In re Tyler, 149 U. S. 164;

Tyler v. Dane County, 289 Fed. 843, 847;

In re Ayers, 123 U. S. 443, 500, 501.

The fact that a portion of the taxes, if they should be collected from the street railway property, would be paid by the Sheriff to the County Treasurer and that the County Treasurer would be required to make a settlement with the State Treasurer, did not give the state any such interest in the litigation as to make the state a necessary party to the suit against the Sheriff and the County Treasurer to restrain them from committing tortious acts.

The law of the State of Washington recognizes the right of a mortgagee of property on which all taxes have been paid, to maintain a suit for an injunction to restrain the Sheriff from distraining the mort-

gaged property to satisfy taxes upon other property. The fact that the state may have an indirect interest in some of the taxes for which the Sheriff threatens distraint constitutes no obstacle in the way of the courts of Washington granting an injunction against the Sheriff to restrain such unlawful distraint. The state has no different interest in the taxes whether the suit to restrain the unlawful distraint of property for the collection of the taxes is brought in the state or in the federal court. In the State of Washington the state is not suable except in the Superior Court of Thurston County and then only by reason of a statute enacted pursuant to the Constitution of the state.

"The legislature shall direct by law in what manner and in what court suits may be brought against the state."

> Constitution of Washington, Article II, Section 26.

"Any person or corporation having any claim against the State of Washington, shall have the right to begin an action against the state in the Superior Court of Thurston County."

> Remington's Compiled Statutes of Washington, Section 886.

As jurisdiction of suits against the State of Washington may be exercised only by the Superior Court

of Thurston County, and as the Supreme Court of the state has recognized that suits to enjoin the collection of taxes may be maintained by a mortgagee where the distraint of the mortgaged property has been attempted for the collection of taxes for which the mortgaged property was not and other property was specifically assessed, it is plain that the indirect interest of the state in the amount to be collected for state purposes does not make the state a necessary party. If the interest of the state is not sufficient to prevent the exercise of jurisdiction of the Superior Court of a county other than Thurston, although suits upon claims against the state can be maintained in Thurston County only, such interest cannot be sufficient to prevent the exercise of jurisdiction in the federal court if the suit be brought therein instead of the state court when the state is not a party to such suit. That such suits may be maintained in the Superior Courts of counties other than Thurston, is established by the following decisions:

Goodsell v. Spokane County, 35 Washington Decisions 476, August 26th, 1925 (not yet officially reported);

Raymond v. King County, 117 Wash. 343;

Puyallup v. Lakin, 45 Wash. 368;

Pennington v. Yakima County, 127 Wash. 538, 540;

Scandinavian-American Bank v. King County, 92 Wash. 650;

Wilberg v. Yakima County, 132 Wash. 219, 220;

Mills v. Thurston County, 16 Wash. 378;

Minshull v. Douglas County, 234 Pacific R. 661, April 3, 1925 (not yet officially reported).

Under the cases just cited, it is clear that the act of the Sheriff in distraining the property covered by appellant's mortgage to collect taxes upon the street railway property, when the street railway property had been specifically assessed for the taxes thereon and the mortgaged property had not been assessed for the taxes upon the street railway property, was a tortious act.

In the very late case of *Goodsell v. Spokane County et al.*, 35 Washington Decisions 476, *supra*, not yet officially reported, the Supreme Court of Washington said:

"The purchaser takes all the assessed property. He must know that he is taking it subject to the taxes because he must know they have not been paid. Having taken all the property it is just that he pay all the taxes, provided enough of the original property can be distrained out of which the whole tax may be made. In this connection, it should be remembered that we have held that such a purchaser does not become personally liable for the tax. Since he takes all the property, he cannot have any dif-

ficulty in determining the amount of the tax. *Besides, as to him the assessment is in effect one on specific property.*" (P. 480.)

In the case at bar the city specifically assumed and agreed to pay such portion of the 1919 taxes upon the street railway property which the city purchased from the company as should be proportionate to the length of time during the year 1919 that the city was in possession of the street railway property and it was in possession of such property for three-fourths of that year. The taxes for which the Sheriff distrained the mortgaged property were taxes for which the street railway property was specifically assessed. The company not only offered to pay its portion of such taxes, but its offer to pay a very much larger portion of the taxes than was the share of the company was refused by the Sheriff. Appellant in its supplemental bill offered to pay any portion of such taxes which the company should pay if the company failed to pay the same. Notwithstanding such offers the Sheriff continued the advertisement of sale of the mortgaged property to satisfy the taxes upon the street railway property. The decision in the case last cited is in another respect applicable to this case:

"Inasmuch as the complaint shows that appellant has offered to pay his just portion of the tax and has tendered the same, there would be no justifica-

tion, under the facts pleaded, for a sale for any purpose of the property distrained." (P. 480.)

If, however, it be assumed that the interest of the state in the amount of the taxes to be collected was such an interest as would deprive the court of jurisdiction to determine the right to collect the state tax by the means which were taken, such assumed fact, if it existed, would not be sufficient to oust the court of jurisdiction to determine the controversy between appellant and the appellees as to the other taxes involved.

Port of Seattle v. Oregon & W. R. R. Co., 255 U. S. 56, 71;

Hopkins v. Clemson Agricultural College, 221 U. S. 636.

Ward v. Love County, 253 U. S. 17, 21, 22, 23;

Tyler v. Dane County, 289 Fed. 843, 847.

The District Court erred in treating the four separate and distinct taxes levied by separate bodies as one tax and in holding that the interest of the state in the one tax prevented exercise of jurisdiction by the court as a federal court in respect to the other taxes. (Specification 3.)

Illinois Central R. Co. v. Adams, 180 U. S. 28, 37;

Walter v. North Eastern R. Co., 147 U. S. 370, 374.

The principal of the city tax alone amounted to the sum of $179,365.76. (R. p. 3.) This tax was levied by the City of Seattle after the making of the contract with the company hereinbefore mentioned and after its acceptance of a deed conveying the street railway property.

Section 11319 of Remington's Compiled Statutes of Washington provides for the levy of a city tax by the City Council for the purpose of carrying on the city government. Section 11320 provides that the City Clerk shall certify a copy of the ordinance making the levy to the County Auditor or other proper officer.

Section 11321 makes the County Treasurer of each county in which there is a city of the first class *ex-officio* collector of city taxes for such city, requires him to execute in favor of the city a good and sufficient bond, the penal sum of which must be fixed by the City Council such bond to be approved by the Mayor of the city.

Section 1322 provides that all such city taxes collected shall belong to the city and the County Treasurer shall pay over all taxes collected during the previous month to the City Treasurer and shall render to the City Comptroller on or before the 10th day of each month between the first day of January

and the first day of May a statement of all taxes collected for the city.

Section 11323 provides that all taxes of such city assessed under the provisions of the chapter shall be collected and enforced by the same officers and in the same manner as delinquent county and state taxes are or may hereafter be collected and enforced.

The text of the sections referred to is set forth in the appendix to this brief.

The city tax was, therefore, a separate and distinct tax belonging to the city and the state had no interest whatsoever in such tax. The supposed interest of the state in the amount to be collected for state purposes could not deprive the court of jurisdiction to restrain the illegal collection of the city tax in which the state had no interest.

The bill alleged the existence of the several taxes and the supplemental bill alleged the refusal by the County Treasurer and by the Sheriff of the county to accept payment of the state tax with interest and costs, the county tax with interest and costs, the school district tax with interest and costs, unless the company would also pay the city tax with interest and costs. After the refusal of the county officers to allow the payment of the state, county and school district taxes with interest and costs the distraint

of the mortgaged property to pay the same taxes upon the street railway, together with the city tax, constituted the commission of a tort.

"Tender of the tax by anyone who has a right to make payment *is effectual to prevent a sale*, whether the tender is accepted or not, but a tender, in order to be effectual, must be of the full amount of *any single tax;* it cannot be of anything less, unless the statute makes provision for payment of a part by itself, as it does sometimes for the benefit of tenants in common or owners of distinct portions of the premises taxed. *But where different taxes are brought together for the purpose of a sale for all*, the taxpayer has *a right to pay any one separately*, and to *contest others*. If the owner of land or the holder of a lien thereon applies in good faith to the proper officer for the purpose of ascertaining the amount of the taxes and of paying the same, and is prevented by such officer's mistake, wrong, or fault, such attempt to pay is generally regarded as equivalent to payment."

Cooley on Taxation (3rd Ed.), page 808.

The tender of the state, county and school district taxes with interest and costs and the refusal of the county officers to accept the same rendered all of their subsequent acts illegal.

"It is well settled by many decisions of this court, that, for the purpose of affecting proceedings to enforce the payment of taxes, a lawful tender of payment *is equivalent to actual payment*, either being sufficient to deprive the collecting officer of all au-

thority for further action, and *making every subsequent step illegal and void.* (P. 282.) * * * The case, then, of the plaintiff below is reduced to this: He had paid the taxes demanded of him by a lawful tender. The defendant had *no authority of law thereafter to attempt to enforce other payment by seizing his property.* In doing so, he ceased to be an officer of the law, and became *a private wrong-doer.* It is the simple case in which the defendant, a natural private person, has unlawfully, with force and arms, seized, taken and detained the personal property of another. (P. 283.) * * * His tender, as we have already seen, was equivalent to payment so far as concerns the legality of all subsequent steps by the collector to enforce payment by distraint of his property. He has the right to say he will not pay the amount *a second time, even for the privilege of recovering it back.* And if he chooses to stand upon a lawful payment once made, he asks no remedy to recover back taxes illegally collected, but may resist the exaction, and treat as a wrong-doer the officer who seizes his property to enforce it." (P. 299.)

Poindexter v. Greenhow, 114 U. S. 270, 282, 283, 299;

Royal v. Virginia, 116 U. S. 572, 579;

United States v. Lee, 106 U. S. 196;

Atwood v. Weems, 99 U. S. 183;

Hills v. Exchange Bank, 105 U. S. 319;

Leet v. Armbuster, 143 Cal. 663;

Woodruff v. Trapnall, 10 How. 190;

Bennett v. Hunter, 9 Wall. 326;

Tacey v. Irwin, 18 Wall. 549;

Helphrey v. Strobach, 13 Wash. 128;

Northern Pacific Ry. Co. v. Franklin County, 118 Wash. 117;

Livieratos v. Commonwealth Security Co., 57 Wash. 376;

Ward v. Thorndyke, 65 Wash. 11;

Weinberg v. Naher, 51 Wash. 591.

The supplemental bill alleged the distraint of the mortgaged property by the Sheriff after the institution of the suit and before the application for a temporary injunction could be heard. It sought to prevent the sale of the property distrained and to stop the continuance of the advertisement of sale. It alleged the willingness of appellant to pay any portion of the taxes upon the street railway property which the court should decree the company or appellant in equity should pay and it prayed that if in order to prevent the sacrifice of the mortgaged property it should be compelled to pay taxes which the city ought to pay, then it should be subrogated to the lien of those taxes upon the street railway property.

As the mortgaged property was distrained after the institution of the suit the taxing officials proceeded at their peril. The distraint of the mortgaged property to enforce payment of the taxes on the street railway property being a tortious act appellant was

entitled to an injunction restraining the paying over of the amount, if collected, to the county and city, or if a preliminary injunction should not be granted then to full relief upon the final hearing of the case.

Wingert v. First National Bank, 223 U. S. 670.

That appellant was entitled to subrogation is well settled by the decisions of the Supreme Court of the state and of this court:

Memphis Railroad v. Dow, 120 U. S. 287, 301, 302;

Dunsmuir v. Port Angeles Company, 30 Wash. 586, 593;

Childs v. Smith, 51 Wash. 457, 461;

Johnson v. Martin, 83 Wash. 375;

Packwood v. Briggs, 25 Wash. 530, 538;

Burgert v. Caroline, 31 Wash. 62, 66;

Moody v. Isselstein, 106 Wash. 294;

Netherlands-American Bank v. Grafke, 100 Wash. 188, 195;

Bollong v. Corman, 125 Wash. 441, 442;

University State Bank v. Steeves, 85 Wash. 59;

Murray v. O'Brien, 56 Wash. 361.

The question whether the four separate taxes could be so consolidated as to make them one tax and the question of the right of appellant to subrogation were

questions affecting the merits of the case. However such questions might be determined upon merits of the suit the District Court had federal jurisdiction to hear and determine them as the amount involved was sufficient and the requisite diversity of citizenship existed between the parties to the suit.

Illinois Central R. Co. v. Adams, 180 U. S. 28, 37.

It is, therefore, respectfully submitted that the decree appealed from should be reversed.

JAMES B. HOWE,
HUGH A. TAIT,
EDGAR L. CRIDER,
Counsel for Appellant.

Appendix

Remington's Compiled Statutes of Washington, 1922

"Section 11319.

"The city council of each city of the first class shall within thirty days after receiving the certificate of the county assessor, as provided in the preceding section, by ordinance in each year fix the rate of taxes to be levied and levy the taxes upon all taxable property, both real and personal, in such city, or subject to taxation therein, as shown by said roll, needed to raise sufficient revenue to carry on the different departments of the municipal government thereof for one year, which year shall be the fiscal year (to be designated in the ordinance) fixed by the charter of such city, and shall be either the current or ensuing fiscal year as required by such charter, or, in the absence of a charter requirement, as such ordinance shall provide. Any other general taxes authorized by the charter of such city to be levied with the annual tax levy may be included in such levy.

"Section 11320.

"The city council shall cause the city clerk to certify a copy of the ordinance making such levy to the county auditor, or other officer authorized to extend the state and county taxes, who shall extend the same upon the general assessment-roll of such county in the same manner and at the same time that he extends the levy for state and county purposes, and shall in turn certify the same to the county treasurer, who shall proceed to collect such

taxes in the same manner and at the same time and with the same power to enforce payment as in the case of state and county taxes. All city taxes may be extended in one column without distinguishing the various funds or purposes for which the same are levied, and a copy of the ordinance making the levy for such city shall be recorded in full in each book making up the assessment-roll.

"Section 11321.

"The county treasurer of each county in which there is or shall be a city of the first class is hereby constituted ex-officio collector of city taxes of such city, and before entering upon the duties of his office he shall execute in favor of such city and file with the clerk thereof a good and sufficient bond, the penal sum to be fixed by the city council, such bond to be approved by the mayor of such city or other authority thereof by whom the bond of the city treasurer is required to be approved. All special assessments and special taxation for local improvements assessed on property benefited shall be collected by the city treasurer except as otherwise provided by this chapter.

"Section 11322.

"All such city taxes collected shall belong to such city and the county treasurer shall, on or before the tenth day of each month, turn over all such taxes so collected for the previous month to the city treasurer and take a receipt therefor in duplicate, and at the same time he shall certify to the city comptroller the amounts of taxes so collected and turn over and deliver with such certificate one copy of the receipt of the city treasurer therefor. The county treasurer

shall also render to the city comptroller, on or before the tenth day of each month, between the first day of January and the first day of May a statement of all taxes collected for such city during the preceding month.

"Section 11323.

"All taxes of any such city assessed under the provisions of this chapter becoming delinquent shall be collected and enforced by the same officers and in the same manner as delinquent county and state taxes now are or may hereafter be collected and enforced. Any real property sold to the county for state, county and city taxes shall be held by the county for the common benefit of the county and city in proportion to the equitable interest of each in the taxes, costs and expenses for which the same were sold. All provisions of law relating to discount on state and county taxes and penalties, interest and costs thereon and the times when the same become due, payable or delinquent shall apply to city taxes levied under authority of this chapter."

DEC 14 1925

No. 194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

OLD COLONY TRUST COMPANY, as Trustee,
Appellant,

—vs.—

THE CITY OF SEATTLE, COUNTY OF KING, W. W. SHIELDS, as Treasurer, and MATT STARWICH, as Sheriff of King County,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. EDWARD E. CUSHMAN,
United States District Judge

MOTION TO DISMISS APPEAL
AND
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THE ARGUS PRESS, SEATTLE

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THE ARGUS PRESS, SEATTLE

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MOTION TO DISMISS APPEAL
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MOTION TO DISMISS APPEAL

Appellees hereby move this court to dismiss the appeal as to them and each of them for the following reasons:

I.

That because the taxes have been paid there is now no actual controversy involving real and substantial

rights between the parties, and no subject matter upon which the judgment of this court can operate.

II.

The appeal is frivolous.

This motion is based upon the records and files in the above entitled cause and the affidavits of appellees W. W. Shields, as Treasurer of King County and Matt Starwich as Sheriff of King County and the affidavit of Howard A. Hanson, solicitor for such appellees, said affidavits being appended to this motion as Exhibits "A", "B" and "C".

STATEMENT

Appellant seeks to enjoin the enforced collection of a tax against another and to require the specific performance of a contract to which it is not a party (R. 15).

In 1919 a personal property tax of $401,017.76 was levied against the operating property comprising the street railway system in Seattle, Washington, and charged to the then owner, the Puget Sound Power & Light Company, which, after the lien of the tax had attached, conveyed the property to the City of Seattle. The validity of the tax was sustained in

Puget Sound Power & Light Company v. Seattle, et al., 117 Wash. 351;

Puget Sound Power & Light Company v. Seattle, et al., 264 U. S. 22, 68 L. Ed. 541.

When the remittitur finally came down to the trial

court from this court the county treasurer was unable to collect in due course. He then prepared and filed papers in distraint with the sheriff, who, pursuant to Sec. 11258 Rem. Comp. Stat., distrained sufficient goods and chattels belonging to the person charged with such taxes to pay the same with interest and accruing costs and fixed June 10, 1924, as the date of sale under such distraint proceedings (R. 12). Sec. 11258 is set forth in full in the Appendix pp. 81-87. The taxpayer, Puget Sound Power & Light Company sought in the District Court to enjoin the distraint and sale proceedings (See affidavit of Howard A. Hanson, Appendix, pp. 71-75).

Appellant brought this action as a separate suit against the same parties seeking the same relief. It alleged that it was trustee for the bond holders under a mortgage given by the taxpayer which covered among other property the goods and chattels distrained (R. 3). It did not disclose the terms of its trust by setting up a copy of the mortgage as part of its bill. It did not allege insolvency of the mortgagor, nor of any of the defendants. It alleged the validity of the tax and that it was for state as well as other purposes (R. 3). It alleged that when the mortgagor sold its street railway system to the City such parties contracted to share in the payment of this tax (R. 3); that the mortgagor had asked the City to pay its share but was refused; that the taxing officers looked to the mortgagor as the taxpayer for the total tax and on failure to collect had distrained. It prayed that the

distraint be enjoined and that the City be compelled to pay to the taxpayer under the contract its share of the tax money.

The distraint was not against the specific property assessed, but under Sec. 11258 Rem. Comp. Stat. was against "sufficient goods and chattels belonging to the person charged with such taxes * * * to pay the same * * *."

Under the local law personal property taxes are a debt of the person assessed:

Porter v. Yakima County, 77 Wash. 299;

Clizer v. Krauss, 57 Wash. 26;

Lewis Construction Co. v. King County, 60 Wash. 694;

Mills v. Thurston County, 16 Wash. 378;

Dingle v. Camp, 121 Wash. 393.

In making distraint, the sheriff is not limited to the property assessed, but may distrain any personal property belonging to the tax debtor within the county sufficient in amount to meet the taxes, together with interest and costs.

Porter v. Yakima County, 77 Wash. 299;

Thompson v. Roe, 63 U. S. 422, 16 L. Ed. 387.

Appellant claimed, however, that distraint should have been confined to the specific property assessed, that the distraint had cast a cloud upon its mortgage security, that it would suffer great irreparable loss and damage and had no adequate remedy at law. Appellant prayed, in the event it paid such taxes, for

subrogation to the lien thereof, and that the City pay to appellant such amount.

In addition to the County and its taxing officers, the City of Seattle was made a party defendant in both suits. The cases were argued together before District Judges Neterer, Cushman and Bourquin. On June 5, 1924, the decisions were rendered in each case refusing injunctions and granting the motions to dismiss. See R. 20 as to case at bar. As to taxpayer's suit see

Puget Sound Power & Light Company v. Seattle, et al., 300 Fed. 441.

The mortgagee (appellant herein) refused to plead further and took this appeal from the order of dismissal. *On June 7, 1924, the tax was paid in full with interest and costs* (See affidavits attached to Motion to Dismiss (Appendix pp. 71-80 herein).

The mortgagor, however, in its suit elected to plead further and filed an amended and supplemental bill omitting the county and its taxing officers as parties defendant, pleading that the tax had been paid and continuing the suit against the City of Seattle alone, seeking payment of a portion of the amount involved in the tax on account of certain agreements between the City and the taxpayer made in 1919 when the City purchased from it the street car system in Seattle. This amended and supplemental bill was dismissed on motion. On appeal of the mortgagor's suit, the Circuit Court of Appeals affirmed the dismissal as to the County and its taxing officers and reversed

the case as to the City, saying, after reviewing the facts:

> "In view of the payment of the taxes, the company does not suggest that it is entitled to any relief as against the county or its officers, aside from subrogation to the tax lien; nor do we think it is entitled to any further relief as against them.
>
> "The decree is therefore reversed as to The City of Seattle and affirmed as to the other appellees, and the case is remanded to the court below for further proceedings in accordance herewith."
>
> *Puget Sound Power & Light Co. v. Seattle, et al.* (C. C. A.), 5 Fed. Rep. 2d Series, 393.

Thereafter this court, on October 19, 1925, denied a writ of certiorari to review such decision of the Circuit Court in the taxpayer's suit (p. 75 this brief).

ARGUMENT IN SUPPORT OF MOTION TO DISMISS

I.

THAT BECAUSE THE TAXES HAVE BEEN PAID THERE IS NOW NO ACTUAL CONTROVERSY INVOLVING REAL AND SUBSTANTIAL RIGHTS BETWEEN APPELLANT AND THESE APPELLEES, AND AS TO THEM NO SUBJECT MATTER UPON WHICH THE JUDGMENT OF THIS COURT CAN OPERATE.

The controversy is ended, and the question is moot. The tax has been paid. The date set for the sheriff's

distraint sale, June 10, 1924, has passed. No sale was had on that date because of prior payment of the tax (see affidavit p. 78 herein). The sheriff's power to sell ceased when payment was made. There is nothing to enjoin. Such is the status of the injunction suit brought by the taxpayer itself. Its right, however, to proceed against the City is unaffected by the termination of the controversy as to the County and its taxing officers.

Now, in the case at bar, appellant is not the tax debtor but a trustee for bond holders under a mortgage, the lien of which embraces personal property covered by the sheriff's notice of distraint. It does not disclose its mortgage, nor plead that it is in possession or entitled to the possession of the property distrained, nor that the tax debtor is insolvent nor that defendants are insolvent. Yet it seeks to stay the hand of the tax collector against a solvent tax debtor and to compel payment of a private contract to which it is not a party.

The right of a mortgagee to compel performance of a money contract between the mortgagor and another does not exist. It is brought forward, however, as an illary to the claimed right of a mortgagee to enjoin the taxing officials from forcing the mortgagor to pay its valid tax debt. This claimed right does not exist. But, even if it did, it fell with the tax payment and with it disappeared the non-existent, ancillary right to compel performance of the contract between the mortgagor and the City. The court in the other

suit, will determine the rights under the contract as between the parties thereto.

As to the suit at bar, the threatened sale for taxes cannot be enjoined, because the time has passed. It did not happen and never can. Enforcement of the contract cannot be had by one not a party thereto. Subrogation cannot be had for obvious reasons. The mortgage is not before the court; payment of the tax, or any part of it, by the mortgagee is a mere contingency, not a fact, so far as this record shows. The certified check (p. 69) shows that the tax debtor paid the tax. If, in this payment, there in fact was mortgagee's money (advanced quite apart from any usual appropriate stipulations as to tax payments in such a mortgage) and if the mortgagee by reason thereof had expected to assert in this suit a right of subrogation, it should have filed in this case an amended or supplemental bill alleging such actual payment. Instead, the record discloses (R. 21) that solicitors and counsel for plaintiff in open court applied for and were granted leave of court until June 7, 1924, to file an amended or supplemental bill of complaint herein, and on June 7, 1924, the day the tax was paid, they announced in open court that no amended or supplemental bill of complaint would be tendered or filed on behalf of the Old Colony Trust Company, Trustee, and that said plaintiff refused to plead further. Plaintiff in each of these suits was represented by the same counsel, Mr. Howe as attorney, verifying the pleadings in the suit at bar. Hence there is now no

actual controversy involving *real and substantial rights* between the parties to this record, and there is no subject matter upon which the judgment of this court can operate. (See affidavits pp. 71-80 herein).

Puget Sound Power & Light Company v. Seattle, et al., 5 Fed. Rep. 2d Series, 393;

Mills v. Green, 159 U. S. 651, 40 L. Ed. 293;

Singer Manufacturing Co. v. Wright, 141 U. S. 696, 35 L. Ed. 906;

Little v. Bowers, 134 U. S. 547, 33 L. Ed. 1016;

Selden v. Montague, 194 U. S. 153, 48 L. Ed. 915;

Jones v. Montague, 194 U. S. 147, 48 L. Ed. 913;

Cheong Ah Moy v. U. S., 113 U. S. 216, 28 L. Ed. 983;

Dakota County v. Glidden, 113 U. S. 222, 28 L. Ed. 981;

New Orleans Flour Inspectors v. Glover, 160 U. S. 170, 40 L. Ed. 382;

Calif. v. San Pablo, etc. R. Co., 149 U. S. 308, 37 L. Ed. 747;

San Mateo County v. So. Pac. R. Co., 116 U. S. 138, 29 L. Ed. 589;

Tennessee ex rel. Maloney v. Condon, 189 U. S. 64, 47 L. Ed. 709;

Atherton Mills v. Johnston, 259 U. S. 13, 66 L. Ed. 814.

In *Mills v. Green, supra*, Mr. Justice Gray observed, pp. 653-654:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence.
>
> "* * * if the intervening event is owing, either to the plaintiff's own act, or to a power beyond the control of either party, the court will stay its hand."

In *Singer Manufacturing Co. v. Wright*, 141 U. S. 696, 35 L. Ed. 906, Mr. Justice Field stated, p. 700:

> "The taxes being paid, the further prosecution of this suit to enjoin their collection would present only a moot question, upon which we have neither the right nor the inclination to express an opinion.

"This subject was considered somewhat at length in *Little v. Bowers*, 134 U. S. 547 (33: 1016). The payment of the taxes was, it is true, made under protest, the complainant declaring at the time that they were illegal, and that it was not liable for them; that the payment was made under compulsion of the writs; and that it was intended to demand, sue for, and recover back the amounts paid. If this enforced collection and protest were sufficient to preserve to the complainant the right to proceed for the restitution of the money, upon proof of the illegality of the taxes, such redress must be sought in an action at law. It does not continue in existence the equitable remedy by injunction which was sought in the present suit. The equitable ground for the relief prayed ceased with the payment of the taxes.

"*The appeal must therefore be dismissed; and it is so ordered.*"

In *Cheong Ah Moy v. U. S.*, 113 U. S. 216, 28 L. Ed. 983, the court declared, p. 218:

"The question, therefore, which we are asked to decide is a moot question as to plaintiff in error, and if she was permitted to give bail it could be of no value to her, as the order by which she was remanded has been executed, and she is no longer in the custody of the marshal or in prison.

"This court does not sit here to decide questions arising in cases which no longer exist in regard to rights which it cannot enforce.

"*The writ of error is dismissed.*"

II.

The Appeal is Frivolous in View of Previous Decisions on the Subject

The order of dismissal (R. 21) was "upon the ground that the court is without jurisdiction as a federal court."

The certificate to this court states (R. 22):

"* * * this certificate is made and granted and the question of the jurisdiction of the suit by the District Court as a Federal Court and the correctness of the ruling and decree of the District Court that as a Federal Court it was and is without jurisdiction to entertain the suit are hereby certified to the Supreme Court of the United States for decision upon such appeal."

Appellant's fourth assigned error (R. 24) is:

"* * * in sustaining the motions of the defendants to dismiss the above entitled suit for want of jurisdiction and in dismissing the above entitled suit for want of jurisdiction in such Court as a Federal Court."

It also assigned errors by reason of the Eleventh Amendment (R. 23-24).

1.

THE DISTRICT COURT AS A FEDERAL COURT WAS WITHOUT JURISDICTION UNDER SEC. 267 OF THE JUDICIAL CODE BECAUSE APPELLANT HAD A PLAIN, ADEQUATE AND COMPLETE REMEDY AT LAW

Under the local law, a suit will lie in the state court to recover taxes paid under protest.

Spaulding v. Adams County, 79 Wash. 193;

Puget Realty Co. v. King County, 50 Wash. 349;

State ex rel. Moore & Co. v. Superior Court, 97 Wash. 250;

Owings v. Olympia, 88 Wash. 289;

Wyckoff v. King County, 18 Wash. 256;

Carlisle v. Chehalis County, 32 Wash. 284;

Lewiston Water & Power Co. v. Asotin County, 24 Wash. 371.

This remedy is plain, adequate and complete.

Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 57 L. Ed. 1288.

In the last mentioned case the court said (p. 485):

" 'The decisions of the state courts in cases of this kind are in conflict and we need not examine them. It is a mere matter of choice of convenient remedy for a state to permit its courts to enjoin the collection of a state tax because it is illegal or unconstitutional. Very different considerations arise where courts of a different, though paramount, sovereignty interpose in the same

manner and for the same reasons. An examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired. It has been held uniformly that the illegality or unconstitutionality of a state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable, and efficient as the remedy in equity'."

In *Indiana Mfg. Co. v. Koehne*, 188 U. S. 681, 47 L. Ed. 651, it was observed that (p. 684):

"It has long been the settled doctrine of the Federal courts that the mere illegality of a tax, or the mere fact that a law upon which the tax is founded is unconstitutional, does not entitle a party to relief by injunction against proceedings under the law, but it must appear that the party has no adequate remedy by the ordinary processes of the law, or that the case falls under some other recognized head of equity jurisdiction, such as multiplicity of suits, irreparable injury, etc."

In *Arkansas Building & Loan Association v. Madden*, 175 U. S. 269, 44 L. Ed. 159, the court said (p. 272):

"The rule is that the collection of taxes under

state authority will not be enjoined by a court of the United States on the sole ground that the tax is illegal, but it must appear that the party taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case within some recognized head of equity jurisdiction."

In *Dows v. Chicago*, 78 U. S. 108, 20 L. Ed. 65, it was declared that (pp. 109-110):

"There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.

"No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary pro-

cesses of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked. In the cases where equity has interfered, in the absence of these circumstances, it will be found upon examination, that the question of jurisdiction was not raised, or was waived."

In *Illinois Life Ins. Co. v. Newman*, 141 Fed. 449, the court said (pp. 450-451):

"It is conclusively settled by an unbroken chain of decisions emanating from the Supreme Court that federal courts of equity will not enjoin the levy or collection of a tax on the single ground of illegality, but that some special circumstance, such as the avoidance of a multiplicity of suits, the casting of a cloud upon title to real estate, or some injury that cannot be remedied by an action at law, instituted either before or after the payment of the tax, or other circumstance bringing the case within the well recognized principles of equity, must be averred in addition to the single fact of the illegality of the tax before a court of equity will take cognizance of the controversy and interpose by injunction."

The presence or absence of an equitable remedy in the state court furnishes no basis for equitable relief in the Federal Court to enjoin the collection of a *tax*.

Illinois Life Ins. Co. v. Newman, 141 Fed. 449, and cases there cited;

Arkansas Building & Loan Association v. Madden, 44 L. Ed. 159.

2.

THE DISTRICT COURT AS A FEDERAL COURT WAS WITHOUT JURISDICTION BECAUSE NO SPECIAL CIRCUMSTANCES ARE ALLEGED TO BRING THE CASE UNDER SOME RECOGNIZED HEAD OF EQUITY JURISDICTION.

This rule is announced in

Dows v. Chicago, 78 U. S. 108, 20 L. Ed. 65;

City Council of Augusta v. Timmerman, 233 Fed. 216;

Illinois Life Ins Co. v. Newman, 141 Fed. 449.

In the decision in the mortgagor's injunction suit, *Puget Sound Power & Light Co. v. Seattle, et al.*, 300 Fed. 441, the court said (pp. 442-443):

"The defendant county officers are not parties to the contract between the complainant and defendant city. There is no collusion shown between the defendant officers and the defendant city.

"The relief sought against the several defendants is totally distinct. That against the defendant officers is equitable; that against the defendant city is predicated on contract for payment of money, and therefore legal. *Cutler v. Iowa Water Co.* (C. C.) 96 Fed. 777; *Walker v. Pow-*

ers, 104 U. S. 250, 26 L. Ed. 729. The action is multifarious.

"Taxation is a right of sovereignty, and only by the payment of taxes can the sovereignty be maintained. Delay by tax collecting officers may derange operations of government, and thereby seriously interfere with public functions. *Dows v. Chicago*, 78 U. S. (11 Wall.) 108, 20 L. Ed. 65. The tax for which distraint is made is *admittedly valid and delinquent*. The defendant tax collecting officers are state officers collecting a state tax, and if acting within state statute are within the meaning of the Eleventh Amendment to the Constitution. In *re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216. Whether the tax here is a contract debt, payable out of the general fund and requiring submission to the electors (*Asia v. Seattle*, 119 Wash. 674, 206 Pac. 366), or an imposed obligation, payable out of the special utility fund (*Twitchell v. Seattle*, 106 Wash. 32, 179 Pac. 127; *Asia v. Seattle*, *supra*), need not be considered.

"There may be equities in favor of the plaintiff, but these equities do not outweigh the right of the sovereignty, or of the public, in being deprived of the necessary use of the public utility in the event of sale, in the absence of provision by ordinance for funds for the payment of the tax in controversy, when weighed against the contention of the plaintiff, one of the con-

tracting parties. The contract was entered into with seeing eyes, and understanding mind, as shown by the record and knowledge of the laws of the state. 'Taxes assessed upon personal property are a lien upon all * * * personal property of the person assessed' from the date of the assessment. Section 11272, Rem. C. S. The imposed duty of the defendant treasurer is to collect the personal tax, and, if not paid after notice, to prepare papers in distraint and file the same with the sheriff, who shall immediately, without notice or demand, distrain sufficient goods and chattels belonging to the person charged with such tax, etc. (the plaintiff is charged with the tax; the assessment was made before transfer), and sell such property after notice, pay to the treasurer the amount collected (section 11258, Rem. C. S.), and on the last day of each month the treasurer shall pay to the state treasurer the amount collected and credited to the various state funds (section 11265, Rem. C. S.), and before the 10th of each month turn over to the city treasurer all moneys collected the previous month (section 11322, Rem. C. S.).

"The tender or offer to pay one-fourth of the tax due by the plaintiff, or to pay either of the levies made for state, county, city or school purposes, cannot serve the plaintiff. There is no provision of statute known to us, nor has our attention been challenged to any, permitting such

payment. Each fund or levy is entitled to its pro rata when the tax is paid, and no officer has a right to accept tax tendered on a particular fund. The duty placed upon the collecting officers carries certain discretion, and in the exercise of that discretion, in the absence of statute, a court of equity may not legislate, by imposing its decree. The plaintiff has an adequate remedy at law. No special circumstances, such as multiplicity of suits, irreparable injury, or cloud upon title to real estate, is involved. *Does v. Chicago, supra; P. S. P. & L. Co. v. Asia et al.* (C. C. A.), 277 Fed. 1. The remedy may not be as speedy, but it clearly is legal and plain and adequate, and upon the record equity may not interfere."

(a) *No multiplicity of suits is involved.*

Montgomery v. Coulitz County, 14 Wash. 230;

Byrne v. Drain, 60 Pac. 433;

Stimson Timber Co. v. Mason County, 97 Wash. 205;

Cooley, Taxation (3d Ed.), pp. 1411, 1415, 1429.

(b) *No cloud upon title to real estate is involved.*

The tax must be a lien upon *real estate* to constitute a cloud upon the title.

Does v. Chicago, 78 U. S. 108, 20 L. Ed. 65, and note;

Pac. Express Co. v. Seibert, 142 U. S. 339, 35 L. Ed. 1035.

This tax is on personal property. The property distrained was "goods and chattels," all personality. The point is set at rest by

Puget Sound Power & Light Co. v. Seattle, 127 Wash. 351, 354, 355.

Puget Sound Power & Light Co. v. Seattle, 268 U. S. 22, 69 L. Ed. 541.

(c) *No irreparable injury is shown.*

Appellant is not the owner of the goods and chattels distrained, and is not in possession, nor entitled to the possession thereof.

Under the local law, a chattel mortgage does not convey to the holder any title to the property, but is only a security.

Silsby v. Aldridge, 1 Wash. 117;

Byrd v. Fuches, 3 Wash. Terr. 328;

Ephraim v. Kelliher, 4 Wash. 243, 29 L. R. A. 604;

Blanton v. Baker, 6 Wash. 50;

Sapsrud v. Nemec, 6 Wash. 87.

A mortgagee cannot demand possession of goods after the levy of an attachment.

Byrd v. Fuches, 3 Wash. Terr. 328.

If the lien of the Trust Company's mortgage were prior to the tax lien, then it will not be affected in any way by a sale of the property distrained. The court held in *Blanton v. Baker*, 6 Wash. 50, that (pp. 51, 52):

"* * * in *Silsby v. Aldridge*, 1 Wash. 117 (23 Pac. Rep. 836), that a chattel mortgage

under the statutes of this state does not convey to the holders of the mortgage any title to the property in question. The mortgage, then, being only a security, the mortgagee has no right in the property other than his right to foreclose. His lien has not been affected in any way by the sale of the property under the subsequent mortgage. All the interest that passed to Baker by virtue of his purchase of the horses was the interest that Taylor had in the horses, which was simply the equity of redemption. Taylor was entitled to the possession of the property under the terms of the mortgage, and Baker as the purchaser of Taylor's interest became entitled to this possession, and the complaint contains no allegation of either actual possession at the time of the alleged conversion, nor of right of possession, nor of demand of possession. We think the allegations of the complaint entirely insufficient to maintain the action, and that the judgment must be reversed, and the case remanded to the lower court with instructions to dismiss the action."

The purchaser at a tax sale takes what the statute provides.

Gustaveson v. Dwyer, 78 Wash. 336;

Kennedy v. Anderson, 88 Wash. 457.

The mortgagee does not owe this tax. It has no right to interfere with the enforcement of the tax. If the tax lien is paramount, the mortgage lien will

disappear on the sale, by operation of law. If the reverse is true, it will remain unimpaired in virtue of the statute. Submission to taxation is not an irreparable injury as that term is used by equity courts. If it were, every embarrassment of a taxpayer would be hailed before an equity court to avoid the burdens of taxation.

It is not alleged that the mortgagor's financial condition is such that it cannot pay this tax and meet the obligations of its mortgage when due. Even if such allegation were made it would be no basis on which to enjoin the distraint and sale, because it was held in

Steubenville, etc. R. Co. v. Tuscarawas Co., 22 Fed. Cases, No. 13388,

that the mortgagees and trustees of a railroad company cannot enjoin the state officers from seizing its rolling stock to enforce collection of taxes, even though the company cannot pay the interest on its mortgage bonds, and would be unable to replace the rolling stock if the same should be sold.

3

THE DISTRICT COURT AS A FEDERAL COURT WAS WITHOUT JURISDICTION UNDER THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BECAUSE THE STATE WAS DIRECTLY INTERESTED IN THE TAX

In this state, the sheriff and treasurer are not mere local officers of the County, but are independent

public officers with powers and duties imposed by statute.

Carter v. King County, 120 Wash. 536;
Kildall v. King County, 120 Wash. 472.

The tax is one consolidated tax.

After the assessments have been made for general tax purposes, and local boards of equalization have reviewed the same, they are further equalized by the State Board of Equalization.

Under Sec. 11224 Rem. Comp. Stat., the State Board of Equalization certified to the county assessor the *amount of state taxes*, and under Sec. 11170 its final equalized valuations.

Sec. 11170 further provides:

> "The county assessor shall in like manner distribute the value so certified to him, to the several cities, towns, road districts, school districts and other taxing districts, in his county, entitled to a proportionate value of the operating property of such railroad: and each assessment so apportioned shall be placed upon the tax-rolls of said county, and the taxes extended against the same, as against other property in said county, cities, towns, school, road, and other taxing districts."

Under Sec. 11231, county commissioners, city and town councils, and directors of school districts determine the *amount of such taxes* to be levied upon the current assessment rolls.

Under Sec. 11236 it is provided that:

"The county auditor shall extend the taxes upon the assessment books in the form herein prescribed. The *rate per cent* necessary to raise the required amount of the *total tax* for state, county indebtedness, county current expense, road, bridge, school, special school and incorporated cities, and all other county, school, municipal and state purposes, shall be computed on the assessed valuation as equalized by the county board of equalization as a whole, under the head of *consolidated tax.* * * * The *amount* of all taxes shall be entered in the proper columns, *as shown by entering the rate per cent of consolidated tax* and of such special tax at the head of the proper columns; on the first day of each month the county treasurer shall distribute pro rata, according to the rate of levy for each fund, the amount collected as *consolidated tax* during the preceding month, and shall certify the same to the county auditor." (Italics ours.)

This *consolidated tax* is payable, as to real estate under Sec. 11252, and as to personalty under Sec. 11258. Such consolidated tax, being the total current tax for a given year is a single tax payable as above prescribed. That each year's consolidated tax is treated as a separate entity is shown by Sec. 11255, which declares:

"The owner or owners of property against which there are delinquent taxes, shall have the

right to pay the *current tax* without paying any delinquent taxes there may be against said property; Provided, however, that in issuing a receipt for such *current tax* the county treasurer shall indorse upon the face of such receipt a memorandum of all delinquent taxes against the property therein described, showing *the year* for which said tax is delinquent and *the amount* of delinquent tax *for each and every year.*" (Italic ours.)

Sec. 11252, Rem. Comp. Stat., provides that:

"The county treasurer shall be the receiver and collector of all taxes extended upon the tax books of the county, whether levied for *state*, county, school, bridge, road, municipal or other purposes * * *." (Italics ours.)

It is alleged that the tax in this case was for "state, county, school district and city taxes." (R. 3.)

As to the State's portion of this total tax Sec. 11265, Rem. Comp. Stat., provides:

"Immediately after the last day of each month, the county treasurer shall pay over to the state treasurer the amount collected by him and credited to the various state funds * * *."

It will be seen, therefore, that under the local law, appellees Shields as treasurer and Starwich as sheriff are the public officers, and the only ones charged by law with the duty of collecting and enforcing the collection of total taxes for state and other purposes. They act for the State. It has a real and substantial

interest in the tax. When the tax is collected, the State's portion is covered into the state treasury. The tax is valid. Its enforced collection is under adjudicated local laws, not alleged to be violative of any provision of federal constitution or laws. These officers were not wrongdoers, acting individually, but public officers acting as such for the State, within and under the law.

The prohibition of the Eleventh Amendment applies

In Re Ayers, 123 U. S. 443;
Poindexter v. Greenhow, 114 U. S. 270;
Fitts v. McGhee, 172 U. S. 516;
Murray v. Wilson Distributing Co., 213 U. S. 151;
Smith v. Reeves, 178 U. S. 436;
Coulter v. Weir, 127 Fed. 897.

Appellant is a citizen of another state and the State of Washington is directly affected by this litigation, as a portion of the tax in question belongs to the State. Hence, this action comes within the prohibition of the Eleventh Amendment. This court has decided that if it appears on the face of the record that the State is a direct party in interest in the controversy, the Federal Courts have no jurisdiction as the court is not bound by the nominal parties on the face of the record.

In the case of *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. Ed. 185, 191, the court held that "the question whether suit is within the prohibition of the

Eleventh Amendment is not always determined by reference to the nominal parties on the record."

In the case of *Ex Parte Ayers*, 123 U. S. 492, 31 L. Ed. 216, 223, wherein the court followed the rule laid down in the case of *Poindexter v. Greenhow*, *supra*, the court said:

> "It must be regarded as the settled doctrine of this court, established by its recent decisions, 'that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record. *Poindexter v. Greenhow*, 114 U. S. 270, 287, 29 L. Ed. 185, 191."

The court further said in said case, in passing upon the question of jurisdiction of the Federal Courts where a State has a direct interest in the controversy, as follows:

> "The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the

administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the Eleventh Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

Ex Parte Ayers, 123 U. S. 492, 31 L. Ed. 216, 229-230.

In the case of *Farmers' National Bank of Hudson v. Jones*, 105 Fed. 459, 462, the court, in considering the effect of the Eleventh Amendment to the Constitution of the United States, made the following comment:

"When the Supreme Court of the United States in *Chisholm v. Georgia*, 2 Dall. 419, 1 L. Ed. 440, decided that under the Constitution that court had original jurisdiction of a suit by a citizen of one state against another state, the Eleventh Amendment of the Constitution was

straightway adopted, taking away this jurisdiction. That amendment reads as follows:

" 'The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.'

"Since the adoption of this amendment, the contract of a state is substantially without sanction, except that which arises out of the honor and good faith of the state itself, and these are not subject to coercion. *Ex Parte Ayers*, 123 U. S. 443, 505, 8 Sup. Ct. 164, 31 L. Ed. 216. One claiming to be a creditor of a state is remitted to the justice of its legislature. It was once said by the Supreme Court of the United States that the Eleventh Amendment was limited to suits in which the state was a party to the record. *Osborn v. Bank*, 9 Wheat. 738, 6 L. Ed. 204. But as a state can perform its functions through officers and agents only, it was soon perceived that, if these officers and agents of the state were liable to be sued and coerced to comply with the judgments and decrees of a federal court, the whole scope and purpose of the amendment would be nullified, and the doctrine of that case on this point has long ceased to be authority.

"It is now settled that the jurisdiction in such

cases is dependent upon the real, and not upon the nominal, parties to the suit, and it is now clear, both upon principle and authority, that a suit against the officers of a state to compel them to do acts which would impose a contractual pecuniary liability upon the state, or to issue any evidence of debt, in the name of the state, which would have that result, is in fact and legal effect a suit against the state, though the state itself is not named a party on the record."

Also:

Minnesota v. Hitchcock, 185 U. S. 386, 46 L. Ed. 954;

Tindall v. Wesley, 167 U. S. 213, 42 L. Ed. 137;

In re Tyler, 149 U. S. 164, 37 L. Ed. 689.

We therefore respectfully submit that the motion to dismiss should be granted.

BRIEF IN ANSWER TO BRIEF OF APPELLANT

Not waiving our motion to dismiss, we submit herewith our brief in answer to the brief of appellant.

I

THERE IS WANT OF JURISDICTION IN THE COURT AS A FEDERAL COURT

Appellant's first specification (p. 7) is for error in "dismissing the suit for want of jurisdiction in the court as a federal court." So is its fourth assignment of error (R. 24). The order of dismissal is "upon the ground that the court is without jurisdiction as a federal court" (R. 21). In certifying the question of jurisdiction to this court the District Court stated (R. 22):

> "* * * this certificate is made and granted and the question of the jurisdiction of the suit by the District Court as a Federal Court and the correctness of the ruling and decree of the District Court that as a Federal Court it was and is without jurisdiction to entertain the suit are hereby certified to the Supreme Court of the United States for decision upon such appeal."

The decisions upon this question as applied to tax cases are so numerous and so uniform against the jurisdiction as to make this appeal frivolous. On this point we respectfully adopt and refer to our

statement and to our argument and authorities under our second ground for dismissal (pp. 12 to 23).

Counsel may urge that the trial court intended to limit its decree and its question certified to the Eleventh Amendment. If so, why submit appellant's fourth assignment and first specification of error? Appellant has brought to this court the question of want of jurisdiction of the District Court as a federal court in this tax case. The lower court's decision thereon is manifestly correct. The case should be affirmed, even though it be held that the Eleventh Amendment did not prohibit the suit.

II

The District Court as a Federal Court Was Without Jurisdiction Under the Eleventh Amendment to the Constitution of the United States Because the State Was Directly Interested in the Tax

This point is embraced in appellant's second and third specifications of error (p. 7) and in its first three assignments of error (R. 23, 24). On this point we respectfully adopt and refer to our own statement and to our argument and authorities under our second ground for dismissal (pp. 22 to 31).

As to Tender

The original bill alleges that the sheriff stated he would not accept a tender of anything less than the

total tax with interest (R. 12). No tender was made of the whole amount or any other sum.

Under the local law one-half of the real estate taxes for a given year may be paid on or before June 1st of that year and the balance on or before November 30th following (Sec. 11252, Rem. Comp. Stat.).

A personal property tax must be paid by March 15th of the year following its levy, or the principal sum thereof becomes delinquent and bears 15 per cent interest (Sec. 11258, Rem. Comp. Stat.). No tender of the principal of the tax now before this court was ever made prior to its delinquency. Nor, after delinquency, was any tender of the principal with interest made, until June 7, 1924, when payment was made.

A tender, to be effectual, must be of the full amount of any single tax; it cannot be of anything less, unless the statute allows payment of a part by itself, as it does sometimes for the benefit of tenants in common or owners of distinct portions of the premises taxed.

Hunt v. McFadgen, 20 Ark. 277;
State v. Carson City Sav. Bank, 30 Pac. 703;
Heft v. Gephart, 65 Pa. St. 510;
Crum v. Burke, 25 Pa. St. 377.

The tender must be unconditional, be made to an officer authorized to receive the tax, and be for the full amount of the tax due, with any accrued interest, penalties or costs, except in cases where the assess-

ment is entirely void, when no tender at all is necessary.

State v. Central Pac. R. Co., 30 Pac. 686;
Edwards v. Upham, 93 Wis. 455, 67 N. W. 728;
Howell v. Hogins, 37 Ark. 110;
Hunt v. McFadgen, 20 Ark. 277;
State v. Carson City Sav. Bank, 30 Pac. 703;
Heft v. Gephart, 65 Pa. St. 510;
Crum v. Burke, 25 Pa. St. 377;
Joslyn v. Tracy, 19 Vt. 569;
Converse v. Jennings, 13 Gray (Mass.) 77;
Albany City Nat. Bank v. Maher, 9 Fed. 884.

Counsel (p. 20), cite Cooley on Taxation to the point that as to different taxes, the taxpayer has a right to pay any one separately and to contest the others. That is true under the local law as to taxes for different years (Sec. 11255, Rem. Comp. Stat.), but not so as to the *consolidated tax for any given year*, after such tax has been litigated by the taxpayer and adjudicated valid in a principal sum.

The cases cited by counsel (pp. 20-21), all relate to mortgages, mechanics' liens, vendors and purchasers and like inapplicable subjects, save alone *N. P. Ry. Co. v. Franklin County*, 118 Wash. 117. There the *legality* of part of the taxes was in issue. An unconditional tender and actual payment was made as to all but the part claimed to be invalid. It was accepted subject to the County's right to assert the legality of the contested part of the taxes, which

was finally held valid. The question then arose as to whether the taxpayer was subject to interest on its taxes or was entitled to the rebate allowed on real property taxes. The court held that, "the tender to have the effect of payment must be an unconditional tender" and that "the payment thus received absolves the taxpayer from any penalty upon that amount."

Moreover, a tender must be kept good by payment into the registry of the court. This the appellant did not do.

State v. Hoffmen, 201 S. W. 653.

The tax enforcing officers dealt with a tax—a total, consolidated tax—adjudged valid, payable only as the statute provides. They could not recognize the contract between the mortgagor and the city, nor accept less than the full tax with interest.

NO SET-OFF OR COUNTERCLAIM CAN BE INTERPOSED AGAINST TAXES

It was the duty of the tax enforcing officers to collect the tax in the full amount, without regard to the controversy between the company and the City.

The general rule is that a set-off or counterclaim cannot be interposed in an action for the recovery of delinquent taxes.

Newport, etc. Bridge Co. v. Douglass, 75 Ky. 673;

New Orleans v. Davidson, 31 Am. Rep. 228;

Camden v. Allen, 26 N. J. L. 398;

Morgan v. Pueblo, etc. R. Co., 6 Colo. 478;

Hawkins v. Sumter County, 57 Ga. 166;
Wayne v. Savannah, 56 Ga. 448;
Village of Charlotte v. Keon, 100 N. E. 1116.

It is well established that no right exists in law or equity to set-off against taxes a debt due to the taxpayer from the municipality to which the tax is payable. Taxes are levied to raise money for specific purposes, as indicated by the appropriations for the current year, and a taxpayer cannot, by exercising the right of set-off divert the taxes to another purpose, namely, the payment of the debt due to him. The strictness with which the rule is applied is seen in the cases which hold that illegal or excessive taxes paid in previous years cannot be offset against current tax demands.

26 R. C. L. 378;
37 Cyc. 1247.

The theory on which this rule of law rests is that tax demands are not in the nature of contracts between party and party, but are the positive acts of the government through its various agents, binding on the inhabitants, and to the making and enforcing of which their personal consent individually is not required.

Apperson v. Memphis, 2 Flip. 363, 1 Fed. Cases No. 497.

In holding that a court of equity would neither set-off a debt against a tax nor enjoin the collection of the tax until the debt which constituted the set-off or

counterclaim was paid, the court in *Finnegan v. Fernandina*, 15 Fla. 379, 21 Am. Rep. 294, said:

> "The amount which the citizen pays to the government through taxation is not regarded as the settlement of a simple contract or matter of indebtedness, capable of being accurately estimated in value in the same manner as an ordinary indebtedness existing between individuals. A public use, a public benefit to all and to each, is one of the essential ends sought to be obtained through such taxation. The public good, through the instrumentality of local municipal governments, exercising political, governmental and civil powers and functions, is the object sought to be attained, and the power of taxation is an essential means given to reach this end. A court of equity should not assume such powers as would, in any event, embarrass the attainment of these ends by the corporation. To enjoin the collection of municipal taxes due upon property owned by individuals, to the extent that there is a debt from the city to such individuals, is the exercise of a power of appropriation and interference with public trusts and the exercise of delegated sovereign powers which has not received the sanction of any court. The amount of the tax is not strictly a debt due by the person. Its collection is enforced without suit, and in many other respects there is a difference (7 Wall. (U. S.) 80). It is a burden

imposed upon property, the return for which it is presumed the taxpayer receives in the matter of benefit through police regulations and other results incident to municipal government."

The application of the rule is seen in the cases which hold that illegal or excessive taxes paid in previous years cannot be offset against current tax demands.

Wayne v. Savannah, 56 Ga. 448;

People v. Chicago & A. R. Co., 247 Ill. 458, 93 N. E. 298;

New Orleans v. Davidson, 30 La. Ann. 541, 31 Am. Rep. 228.

In *Hedge v. Des Moines*, 141 Ia. 4, 119 N. W. 276, the court said (p. 283):

"A special assessment is a tax. * * * A tax is not liable to counterclaim or set-off, nor is it subject to attachment or execution * * *. Under this rule, even if the special tax in question had been levied for the benefit of the defendant city, the plaintiffs could not extinguish them by interposing against them valid counterclaims against the city. Taxes are usually levied for particular purposes, and are carried in the public treasuries in separate and particular funds. It is essential to the machinery of government that they be collected and applied to the particular purposes for which they are levied. If they may be waylaid by the creditors of the municipality and seized by attachment or execu-

> tion, or if the taxpayer may set-off against them his counterclaims against the municipality, then the special purposes of taxation are thwarted, the power of the government to accomplish its ends is checked, and the orderly conduct of public affairs through the machinery of government may be rendered quite impossible. Parties, therefore, who have alleged claims against the assessing municipality, must pursue their ordinary remedy in the courts by independent action."

To the same effect is the language of the court in *Burlington v. Palmer*, 67 Ia. 681, 25 N. W. 877, wherein the court, in denying the right of the defendant to set up a counterclaim in an action brought by a city to recover a special tax, said (p. 878):

> "The tax is levied in the exercise of governmental authority conferred by the state upon the city and is to be expended for special purpose demanded by the wants of the public. Surely the taxpayer has no right to divert the revenue raised by the tax to purposes other than those for which it was levied. Did he possess such authority, the public would be deprived of benefits which municipal governments are intended to promote. If a tax levied to macadamize a street may be diverted to the liquidation of damages sustained by the taxpayer by reason of the negligent performance of the work, it is plain that the revenue might be appropriated

to a purpose other than that prescribed by law. But this the courts will not permit. The tax is set apart for the improvement—it cannot be disbursed for other purposes. Defendant's claim for damages is to be paid out of the general fund of the city. If he may plead it as a counter-claim, the special fund would be devoted to general purposes. This the law will not permit."

The general law is well settled that no set-off is admissible against demands for taxes levied for general or local governmental purposes.

Scobey v. Decatur County, 72 Ind. 551;

Finnegan v. Fernandina, 15 Fla. 379, 21 Am. Rep. 294.

In *Gatling v. Carteret County*, 92 N. C. 536, 53 Am. Rep. 432, in holding that an indebtedness of a municipal corporation cannot be set-off against an amount owed for taxes, either in law or equity, the court said:

"To accord to the courts of chancery the power to interfere with taxation by interposing to set-off the indebtedness of the government against the taxes might greatly embarrass the operation of its machinery, if not clog its very wheels. The courts of chancery are therefore not clothed with any such power."

In *Anderson v. Mayfield*, 93 Ky. 230, 19 S. W. 598, and in *Cobb v. Elizabeth City*, 75 N. C. 1, both of

which involved similar facts, the same conclusion was reached.

And in *Camden v. Allen*, 26 N. J. L. 398, in holding that a tax was not liable to set-off, the court said that to permit such set-off "would be utterly subversive of the power of government, and destructive of the very end of taxation."

In *Newport & C. Bridge Co. v. Douglass*, (12 Bush) 75 Ky. 673, in holding that an alleged indebtedness for transportation of troops for the government could not be set-off against the taxes levied by the state for the support of its government, the court said:

> "In the imposition of taxes, the state acts in its sovereign character; and where it finds it necessary or convenient to resort to the courts to enforce the performance of the public duty, or the satisfaction of the public burden resting on the taxpayer, it cannot be met and defeated by an ordinary plea of set-off. This public duty is absolute and imperative. The tax is not a mere debt due from the citizen to the government, and the courts have no power to treat it as a debt, without the express sanction of the legislature."

And in *McCracken v. Elder*, 34 Pa. 239, it was held that a claim for damages arising out of a breach of contract could not be set-off against school taxes in an action to recover such taxes.

So, a claim for the use of a railroad during war cannot be set-off in an equitable suit by the United

States to recover taxes assessed against the railroad company.

United States v. Pacific R. Co., 4 Dill. 66, Fed. Cas. No. 15983.

Nor can a claim for services rendered be set-off against a borough in an action by it to recover from a tax collector the balance of a school tax.

Wilson v. Lewistown, 1 Watts & S. 426.

In *Aplin v. Van Tassel*, 73 Mich. 28, 40 N. W. 847, it was held that the county treasurer could not counterclaim a county claim against the state in a suit by it to compel him to pay over taxes collected by him, especially as the statutory duty of the treasurer was absolute and specific as to paying over public moneys, although the board of supervisors of the county had attempted to authorize him to pay over no money until the county was credited with the amount claimed. The court said that the county treasurer was acting directly for the state, and that a set-off was as direct an exercise of an affirmative jurisdiction as a suit, and could not be pleaded when not authorized by statute:

> "The treasurer, in making the collection, acts, so far as state taxes are concerned, for the state, and for no other body. The supervisors have no more control over the money in his hands than if it were in the state treasury. It is a distinct trust fund, and can no more be stopped there, and devoted to county purposes, than it could be attached or garnished for the county, or for

any one to whom the county is indebted. There is no point of view in which this money can be allowed to be impounded or retained in his hands which does not involve every element of a suit against the state. It would be a very dangerous doctrine to allow the revenues of the public to be tampered with while in process of realization."

Aplin v. Van Tassel, 73 Mich. 28, 40 N. W. 847, 849;

Aplin v. Board of Supervisors, 73 Mich. 182, 41 N. W. 223;

Auditor General v. Bay County, 106 Mich. 662, 64 N. W. 570.

are to the same effect.

The basis of the *Aplin* case is that the county treasurer is an independent public officer, which rule is recognized in this state in

Kildall v. King County, 120 Wash. 472;

Carter v. King County, 120 Wash. 536.

It has been held that over-payment of taxes made by a debtor cannot be set-off against the taxes of the following year, as taxes, for reasons of public policy, are not such demands as admit of pleas in compensation.

New Orleans v. Davidson, 30 La. Ann. 541 and 554.

So in *McVeigh v. Lanier*, 50 Ark. 394, 8 S. W. 141, it was held that an over-payment of taxes can-

not be made a set-off in favor of the land owner against subsequent taxes.

And in *Wayne v. Savannah*, 56 Ga. 448, it was held that property holders who have paid, whether voluntarily or by coercion, illegel taxes in former years, have no right to set-off such payments against executions issued for the taxes of later years.

And in *Hawkins v. Sumter County*, 57 Ga. 166, it was said that a municipal or county corporation must be allowed to collect its revenues for local government upon principles of public policy, and that the courts will not favor any interruption of such collection by affidavit of illegality claiming set-off. See also, to the effect that illegal taxes paid by mistake cannot be set-off against unpaid taxes:

People ex rel. Graff v. Chicago & A. R. Co., 247 Ill. 373, 93 N. E. 424;

People ex rel. Graff v. Chicago, B. & Q. R. Co., 247 Ill. 340, 93 N. E. 422.

Another class of cases, which supports the general rule, is based upon the principle that taxes are not in the nature of contracts between party and party, but grow out of a duty to and are the positive acts of the government, to the making and enforcing of which their personal consent individually is not required.

Apperson v. Memphis, 2 Flip. 363, Fed. Cas. No. 497;

Anderson v. Mayfield, 93 Ky. 230, 19 S. W. 598;

Keep v. Frazier, 4 Wis. 245.

And in *Charlotte v. Keon*, 128 N. Y. Supp. 80, it was held that in an action by a village for delinquent taxes, a counterclaim for a debt due from the village is not available, it being said that the action is brought by the village in its governmental capacity rather than as an individual upon a contract.

In *Bell v. Mobile & O. R. Co.*, 4 Wall. 598, it was held that it was no part of the sheriff's duty to settle differences that had arisen or might arise between the county and its taxpayers, the court observing,

> "It was no part of his business to sit in judgment on the proceedings of the Board of Police, nor was he at liberty to constitute himself an arbiter to settle the differences that had arisen or might arise between the county, the taxpayers and the company."

That no set-off or counterclaim is allowed against taxes is well stated in Cooley on Taxation (4th Ed.) Sections 22, 1335 and 1336.

DISTRAINT AFTER BILL FILED

The distraint made by the sheriff after the filing of the bill was not an abuse of process for the reason that he was proceeding strictly in compliance with the provisions of the state law. In the absence of any restraining order he was entitled to proceed just the same as if this suit had been instituted in the state court and no restraining order issued.

The rule is that jurisdiction of a federal court

will be protected, after the bill if filed against any suit brought later in the state court, if the *res* will be affected by the decree in the federal court. That is, the property itself must stand subject to a decree in the federal court affecting its disposition. If it does, then a later suit in a state court will not affect the jurisdiction of the federal court. But that question is not involved in this case for the reason that distraint by the sheriff is not a suit or action in the state court. It is simply the act of an independent public official making an enforced collection of taxes in strict compliance with the statute. This raises no question of conflict of jurisdiction. The issue would be the same if plaintiff had gone into the state courts for an injunction. Since there is no conflict of jurisdiction, the sole question is, in either court: Can an officer act in the performance of his duty until enjoined, or must he stop upon the filing of a suit to enjoin in any court?

To illustrate, if appellant had gone into the state court prior to distraint, would the state court be compelled to treat the distraint so made as an imposition on the dignity of the court, when appellant could have secured the protection of the state court by a restraining order upon tender into court of the amount of the tax?

The sheriff's own conduct here shows the greatest respect for the authority of the court rather than any lack of respect, for he could have made actual physical seizure of a considerable part of the prop-

erty distrained, could have moved it away and deprived the owner of its custody and use. As a matter of fact, he simply made a constructive seizure by serving and posting the notices of distraint. This fact when considered in connection with the fact that it was a matter of common knowledge that such distraint was contemplated and that the papers were being prepared and the further fact that appellant had several notices that the distraint would be made, with ample time to secure a temporary restraining order, if it was entitled to one, leaves it no equitable ground for complaint against the conduct of the sheriff, who was simply proceeding to collect this valid tax in the same manner as he would proceed to collect any other tax.

AS TO DISTRAINT OF MORTGAGED PROPERTY FOR TAXES

The cases cited by counsel (pp. 14-15) do not aid appellant. The following principles govern the case on this point. The property of a taxpayer must submit to the burden of taxes. Under the local law personal property taxes are a lien on the specific property assessed and are a debt of the person assessed. In the enforcement of such taxes distraint may be made either against the specific property assessed or against any goods and chattels belonging to the taxpayer.

It is immaterial to the distraining officer whether the lien of any mortgage on the goods distrained is prior to the tax lien or not. If not, the mortgage

lien is destroyed with the enforcement of the tax lien. If the mortgage lien is superior to the tax lien, then the only title conveyed by the sheriff's sale is the interest of the taxpayer.

Binnian v. Baker, 6 Wash. 50.

In neither event can the mortgagee prevent the enforcement of the tax lien against goods and chattels in the hands of and owned by the mortgagor.

> "In making the distraint, the treasurer (now the sheriff) is not limited to the property assessed, but *may distrain any personal property belonging to the tax debtor within the county, sufficient in amount to meet the taxes, together with interest and costs.*" (Italics ours.)

Porter v. Yakima County, 77 Wash. 300.

The cases cited by counsel (pp. 14-15) rest on different facts and do not disturb the rule. The facts in the quoted case (p. 15) *Goodsell v. Spokane County*, as stated by the court show its inapplicability, the opinion observing:

> "The question in this case may be stated thus: Where various articles of personal property, of unequal value, have been assessed to A, as owner, for taxation purposes, the assessment and valuation being made of the property as a whole or in bulk, and tax has been levied thereon and thereafter a part of the property is sold to B, and A does not pay any portion of the tax, can the whole thereof be made out of the part of

the property owned and held by B at the time of distraint?"

Goodsell v. Spokane County, 35 Wash. Dec. 476.

Counsel state (p. 11):

"In the case at bar the suit was to restrain two *municipal corporations* and *their officers* from *violating* the *law* of the *state to the irreparable injury of* appellant." (Their italics.)

What law? None is pleaded or cited nor do we know of any such law. There is no tort involved in this case. They are independent public officers collecting and enforcing the collection of a total tax for state and other purposes. The state is directly interested. The tax officers cannot accept less than the total tax with interest. They can allow no offset or counterclaim. Neither they nor King County were party to the sale of the street railway system to the City of Seattle.

Their refusal to be drawn into the controversy between the Company and the City makes them guilty of no wrongdoing. The state is a party in a substantial sense, represented by its tax enforcing officers *as officials*. None of the cases cited by counsel (pp. 9-12) are tax cases. Those against officers involve acts contrary to law, for which acts the officials, as individuals, may be sued irrespective of the Eleventh Amendment.

III

THE ORIGINAL AND SUPPLEMENTAL BILLS OF COMPLAINT ARE MULTIFARIOUS AND THE PARTIES DEFENDANT THEREIN ARE MISJOINED

In both the original and supplemental bill appellant seeks to enjoin all of the defendants from distraining and selling for taxes the property of the Puget Sound Power and Light Company, and further seeks to compel the City to comply with the proviso in the purchase contract between the mortgagor and the City. The County and its officers are not parties to such contract and are not concerned therewith. The City is in no wise concerned with the distraint.

In the suit for injunctive relief, the City is neither an indispensable, necessary nor proper party, and in the application for specific performance, the County and its officers are neither indispensable, necessary nor proper parties. Specific performance will not lie to compel the payment of money only. The remedy is a suit at law.

Heine v. Board of Levee Comrs., 19 Wall. 655, 22 L. Ed. 223;

Raton Water Works Co. v. Raton, 174 U. S. 360, 43 L. Ed. 1005.

Rule 26 of the Rules of Practice in Equity in the Federal courts does not permit the joining of an equitable proceeding with that of an action at law, particularly when the defendants in such bill are unrelated as they are in the action at bar.

The following cases sustain this contention:

"While the equity and law sides of the Fed-

eral Court are merely different sides of the same court, it is entirely clear that separate claims which are distinctly of equitable and legal cognizance cannot be litigated in the same suit but must be maintained in separate suits."

Bucyrus Co. v. McArthur, 219 Fed. 266, 271.

"Misjoinder of parties plaintiff having no interest and to whom no relief can be granted renders the bill of complaint multifarious and devoid of equity. Nor does it appear from the complaint that appellants have any community of interest in the causes of action alleged, and unless some such interest appears they may not be joined in one bill against the appellee. A bill states different causes of action where it seeks to enforce distinct and separate rights of different plaintiffs and distinct and separate liabilities of different defendants. *Hale v. Allison*, 188 U. S. 56, 47 L. Ed. 380."

DeCroisset, et al., v. Vitigraph Co. of Am., et al., 262 Fed. 100, 102.

"The first is strictly a suit in equity seeking special relief which only a court of chancery can grant.

"The second is an action at law for the recovery of real property with the rents and profits. The two cases are entirely different in their nature and can be determined, where the distinctions between legal and equitable proceedings are maintained, only in separate suits. In

the one case if the allegations of the plaintiff must be sustained, the judgment must be declaratory and prohibitory, judging that the deed of the sheriff to the defendant constitutes a cloud upon his title and enjoining the defendant from asserting any claim to the premises under it. In the other case, if the defendant establishes his averments, the judgment must be for the possession of the premises and the rents and profits. In the Federal Court such a blending of equitable and legal causes of action in one suit is not permissible under the Process Act of 1792, substantially re-enacted in the Revised Statutes, which declares that in suits in equity in the Circuit and Districts Courts of the United States the forms and modes of proceeding shall be according to the principles, rules and usages which belong to courts of equity. 1 Stat. at L. 276, Sec. 2; R. S., Sec. 913. This requirement has always been held obligatory upon parties and the court whenever the question has been raised. *Thompson v. R. R. Co.*, 6 Wall. 134; 18 L. Ed. 765. A party who claims a legal title must therefore proceed at law, and a party whose title or claim is an equitable one must follow the forms and rules of equity proceedings as prescribed by this court under the authority of the Act of August 23, 1842. 5 Stat. at L. 518, Sec. 6."

Hurt v. Hollingsworth, 100 U. S. 100, 25 L. Ed. 569, 570.

"The bill is clearly multifarious. 'By multifariousness in a bill is meant improperly joining in one bill distinct and independent matters and thereby confounding them, as, for example, the uniting in one bill of several matters perfectly distinct and unconnected against one defendant.' Story's Eq. Plead. (10th Ed.), § 271. The joinder of distinct and independent matters, each of which would constitute a cause of action, in the same bill brought by a single complainant against the same defendant. * * * No general rule can be laid down as to what constitutes multifariousness. The court must exercise a sound discretion in determining from the circumstances of each case whether the bill is liable to that objection."

State Trust Co. v. Kansas City P. & G. R. Co., 128 Fed. 129.

"It is enough to say that the real objection to the complaint is that the plaintiff has attempted to unite an action at law with a suit in equity as under the state practice and the courts he is permitted to do, but that practice does not prevail in this court. The plaintiff may bring his action at law against the Sullivan-Kelly Co. to recover the sum of money alleged to be due, and it may also bring a suit against the defendant corporation and Devlin to subject the assets in

the possession of Devlin to the payment of any judgment that may be recovered against the corporation; but it cannot unite a suit in equity with an action at law in the same complaint. The distinction between the law and equity must be observed in all actions or suits brought in the United States court. The equity jurisdiction of the courts of the United States is derived from the constitution and laws of the United States. The practice is regulated by the various courts and by the rules established by the Supreme Court affected by any state legislation. *In the United States courts the union of equitable and legal causes of action are not allowed. These general principles are too well settled to require an extended discussion.*"

Coit & Co. v. Sullivan-Kelly Co., et al., 84 Fed. 724-725.

"By multifariousness 'Is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them. As, for example, uniting in one bill several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill.' Story Eq. Pl., Sec. 271. In Daniel's Ch. Pr., 335, it is said in explanation of this, that 'It may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of

the suit and, nevertheless, those transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records'."

Walker v. Powers, 104 U. S. 250, 26 L. Ed. 729, 731.

"In other words, one cause of action is against one defendant at law and the other cause of action is against both defendants in equity. In my opinion, for these reasons the bill is multifarious and the demurrer should be sustained."

Thornton N. Mottley Co. v. Detroit Steel & Spring Co., et al., 130 Fed. 396.

Also, see:

Hayden v. Thompson, 67 Fed. 273;
Leslie v. Leslie, 84 Fed. 70;
Inman v. N. Y. Inter. Water Co., 131 Fed. 997;
Merriman v. Chicago & E. I. R. Co., 64 Fed. 535.

Nor is the multifariousness of the bill cured, or the misjoinder of the parties justifiable, by reason of the allegation in the bill that the City had entered into a combination and conspiracy with certain county officers whereby the County was to collect the tax (which was its duty anyway), and that by reason thereof it is necessary for the plaintiff to have discovery concerning such combination and agreement. The City speaks, and can speak, by ordinance only, and where it is sought to charge the City with the activities of administrative officers it is necessary

to allege that their unlawful acts were done pursuant to ordinance.

Hotel Cecil Co. v. Seattle, 104 Wash. 460, 462, 177 Pac. 347;

Puget Sound Power & Light Co. v. Seattle, 271 Fed. 958, 963;

Puget Sound Power & Light Co. v. Seattle, 330 Fed. 441, 443, 446.

Nor does the bare allegation of fraud, concealment or conspiracy justify a bill of discovery in equity in a cause that is really an action at law.

Whitehead v. Shattuck, 138 U. S. 146, 151, 34 L. Ed. 873;

So. Penn. Oil Co. v. Miller, 175 Fed. 729, 735;

Hayden v. Thompson, 67 Fed. 273, 276.

There being accorded the plaintiff the right under the "conformity act" to probe the minds and consciences of the adverse parties by way of interrogatories authorized under state law, a pure bill of discovery cannot be maintained in the Federal courts because it is no longer necessary.

Safford v. Ensign Mfg. Co., 120 Fed. 480, 482, 483.

IV

The Application by the Appellant in Its Supplemental Bill of Complaint For Subrogation by Reason of the Facts Should Not Be Granted

Appellant prays to be subrogated to the authority and rights of the County in the collection of the tax

in question, in the event that it becomes necessary for it to pay such tax in order to protect its interest as mortgagee, a contingency which can never take place, as the tax is paid. Appellant not being compelled to pay the tax to protect its interest as mortgagee, there is no reason in equity or otherwise to extend the equitable doctrine of subrogation. Subrogation must be denied in any event for the following reasons:

(a) That appellant has not been compelled to pay the tax or any portion thereof;

(b) That under the facts existing, subrogation would be against the broad principles of public policy; and

(c) Subrogation being an equitable remedy should be denied where there is a plain, complete and adequate remedy at law.

Now as to these propositions:

(a) *The appellant company has not paid the tax nor any portion thereof.*

If subrogation is permitted at all, it should only be permitted in favor of the mortgagor which paid the tax.

(b) *Under the facts existing, subrogation would be against the broad principles of public policy.*

Subrogation is, in practice, the substitution of one person in the place of another, and the substitute in all respects is put in the place of the party to whose rights he is subrogated. It is a doctrine which will be applied only according to the dictates of equity

and good conscience and considerations of public policy. The court should hesitate to apply this doctrine to cases where the substitution would result in conferring upon individuals rights and powers peculiarly designed for, and adapted to, public purposes.

In the case of *Sperry v. Butler*, 53 Atl. 899, 900, a case in which the plaintiff therein endeavored to invoke the doctrine of subrogation for the payment of a tax, the court said as follows:

> "The plaintiff, in support of his contention in his appeal, invokes the doctrine of subrogation. He says that by his payment of taxes and assessments he has become subrogated to the rights of the municipalities to which payment was made under the liens which existed in their favor. Let us first inquire to what extent, if at all, such subrogation may be had in favor of a private individual. Tax liens are a part of the governmental machinery provided by law to secure public revenues. The operation of this machinery of taxation is placed in the hands of public officials. The powers conferred upon them are in many respects arbitrary and summary. They find their justification in the necessities of government, and their palliation in the fact that public officials alone are intrusted with their exercise, and that they can be used to subserve public ends alone. These powers are oftentimes such as ought not to be at the command of private individuals, and subject to their

caprice, greed or malevolence. Take, for example, the powers which exist in favor of the public in the matter of the collection of taxes. The public representatives may immediately, after demand, summarily levy upon estate or body. Clearly, these are powers which individual ought not to have over individual. They were devised and intended for the welfare of the organized public, and not to be passed about from man to man. The plaintiff asks to be subrogated to the public right to foreclose. The City of Hartford and the school district to whom the taxes in question were paid were vested with other rights to secure the collection of the taxes due them. By the same arguments advanced to justify the right now contended for, the right of the plaintiff to avail himself of any of the summary means at the command of the city or school district to enforce the payment of their claims would be supported. Subrogation, to quote the contention of the plaintiff's brief, is 'the substitution of one person in the place of another. * * * The substitute is put in all respects in the place of the party to whose rights he is subrogated.' The argument goes to the full extent of full and complete substitution, to-wit, the vesting in the substitute of all the powers of the party whose place is taken. This argument overlooks the important facts that subrogation is an equitable, and not a legal, right.

Its foundation, it is said, is on equity and benevolence. *In re Wallace's Estate*, 59 Pa. 401. It is a doctrine, therefore, which will be applied, or not, according to the dictates of equity and good conscience, and considerations of public policy. When the case is one of the subrogation of the individual to public rights and remedies, the situation assumes an aspect not presented where the substitution relates to private rights. Questions of public policy—questions as to the propriety of turning over the governmental machinery to individuals, and conferring upon them the powers of the organized public—at once arise. The inquiry becomes one not of legislative power to provide for a complete or partial substitution, but one of judicial discretion in the administration of equitable principles under equitable considerations. *So it is that the courts ought to hesitate, and have hesitated, to apply the doctrine of subrogation to cases where the substitution would result in conferring upon individuals rights and powers peculiarly designed for and adapted to public purposes*, and as a part of the governmental machinery, without statutory sanction, express or implied. *Hinchman v. Morris*, 29 W. Va. 673, 2 S. E. 863; *Griffing v. Pintard*, 25 Miss. 173; *Trust Co. v. Hart*, 22 C. C. A. 473, 76 Fed. 673, 35 L. R. A. 352; *In re Wallace's Estate*, 59 Pa. 401. The power of taxation is one of the drastic pow-

ers exercised by governmental bodies. Its machinery is skilfully designed to accomplish the desired results most certainly and effectually. It is adapted to its uses, but not to private, unrestrained exercise. Therefore it is that, in the absence of legislation expressly or by reasonable implication authorizing the substitution of the individual for the community, the powers specially created as incidental to the exercise of the public right of taxation ought not to become delegated to private persons by judicial intervention, unless, indeed, it be in rare and extreme cases."

The machinery for collecting taxes may not be turned over to a stranger. Sound public policy forbids it.

"In every case we have been able to find subrogation is applied under the authority of particular statutes or on the ground that the assignment was made to protect some property right. We are not therefore disposed to hold that all the machinery for collecting taxes may be turned over to an entire stranger in interest under and by virtue of a mere agreement made with the owner of the property. In our opinion, sound public policy forbids it. Powers intended to be exercised by public officers would be conferred upon private individuals."

Gibson v. Western, etc. Life Ins. Co., 171 S. W. 390, 392.

"The collector claimed the right to be subrogated to the lien of the state, but the right was denied. The court said, in substance, that it might well be doubted whether a person could ever claim subrogation to the rights of the state as respects a lien for taxes, but that such right could not be claimed where the payment of taxes was voluntary, nor where subrogation, if allowed, would prejudice the rights of a third party, such as a subsequent judgment creditor."

Mercantile Trust Co. v. Hart, 76 Fed. 673, 676.

See:

Mersich v. Hartford, etc. R. Co., 55 Atl. 664;
Preston v. Wright, 17 Atl. 128.

(c) *Subrogation is an equitable remedy and should be denied where there is a plain, complete and adequate remedy at law.*

Subrogation is an equitable action. It therefore follows that if the appellant company has a plain, complete and adequate remedy at law, the court was correct in granting the motion to dismiss the bill and supplemental bill of complaint.

It has been held in the case of *Myers v. Sierra Val. Stock & Agricultural Assn., et al.*, 55 Pac. 689, that if the plaintiff has a plain, complete and adequate remedy at law, subrogation is not the proper remedy. The court said, on page 691, as follows:

"Respondents contend that, although they had a remedy at law, still there was concurrent jurisdiction in equity—and Mr. Pomeroy's Equity

Jurisprudence (section 139) is cited. But the author there says: 'The fact that the legal remedy is not full, adequate, and complete is, therefore, the real foundation of this concurrent branch of the equity jurisdiction.' *Where the remedy is a mere recovery of money, the case does not come under the concurrent jurisdiction, but comes within the sole cognizance of the law,* unless the right of action is dependent upon, or is in some way connected with, some equitable feature or incident, such as fraud, mistake, accident, trust, accounting, or contribution, and the like. Id. § 178. It was said in *De Witt v. Hays*, 2 Cal. 463, that, 'to entitle the plaintiff to the equitable interposition of the court, he must show a proper case for the interference of a court of equity, and one in which he has no adequate or complete relief at law.' And Mr. Pomeroy says at section 354: 'If, therefore, the facts stated in the pleadings show that the primary rights, the cause of action, and the remedy to be obtained are legal, then the action is one at law, and falls within the jurisdiction at law.' The action here was avowedly to obtain contribution from the stockholders, but this contribution, as we have seen, was a statutory right, which was enforceable by a simple action in assumsit, in which full and adequate relief was obtainable. The complaint must be treated as stating an

action at law, and the court, therefore, was without jurisdiction."

" 'Equitable subrogation' implies that there is no adequate remedy at law, but here the remedy is not only adequate, but it is plain, simple, and speedy."

Carstenbrook v. Wedderien, 94 Pac. 372, 373.

See:

McGee v. McManus, 12 Pac. 451.

CONCLUSION

Appellees respectfully submit

(1) That the motion to dismiss should be granted, and if not,

(2) That the decree of dismissal should be affirmed.

Respectfully submitted,

EWING D. COLVIN,
HOWARD A. HANSON,
Counsel for Appellees, except The City of Seattle.

THOMAS J. L. KENNEDY,
GEORGE A. MEAGHER,
Counsel for Appellee, The City of Seattle,

APPENDIX

EXHIBIT "A"

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

OLD COLONY TRUST COMPANY as Trustee, *Appellant*,

—vs.—

THE CITY OF SEATTLE, COUNTY OF KING, W. W. SHIELDS, as Treasurer, and MATT STARWICH, as Sheriff of King County, *Appellees*.

No. 194

AFFIDAVIT OF HOWARD A. HANSON IN SUPPORT OF MOTION TO DISMISS

STATE OF WASHINGTON }
COUNTY OF KING } ss.

HOWARD A. HANSON, being first duly sworn on oath deposes and says: That this affidavit is made in support of the motion to dismiss herein of Appellees; that affiant is an attorney-at-law, duly admitted to practice before the bar of this court; that at all times herein mentioned he has been and now is the Chief Civil Deputy Prosecuting Attorney of King County, Washington, and as such has had charge for King County and its taxing officers of all litigation

over the 1919 personal property tax herein involved; that the validity of this tax was attacked in the Superior Court of the State of Washington for King County in Cause No. 139815 entitled "Puget Sound Traction Light & Power Company, a corporation, Plaintiff vs. The City of Seattle, County of King, Frank W. Hull, as Assessor of King County, Norman M. Wardall, as Auditor of King County, and Wm. A. Gaines, as Treasurer of King County, Defendants."

That on the 10th day of December, 1920, the said Superior Court entered a final judgment and decree affirming the validity of said tax and dismissing the case; that plaintiff appealed said case to the Supreme Court of the State of Washington, the same being docketed as Cause No. 16497 and entitled "Puget Sound Power & Light Company, a corporation, formerly Puget Sound Traction Light & Power Company, Appellant, vs. The City of Seattle, et al., Respondents—The City of Seattle, Appellant, v. Puget Sound Power & Light Company, et al., Respondents"; that said appeal was heard before the Supreme Court of the State of Washington in Department No. 2 and on October 15, 1921, that Department affirmed the judgment and decree of the trial court and on a rehearing before the Supreme Court of the State sitting *en banc* said court on June 12, 1922, adhered to the decision of the Department and affirmed the judgment, all of which is set forth in 117 Wash. p. 351, *et seq.*

That on writ of error proceedings to this court in

Cause No. 653, October Term, 1922, entitled "Puget Sound Power & Light Company, and The City of Seattle, Plaintiffs in Error, vs. County of King, Frank W. Hull, as Assessor of King County, Norman M. Wardall, as Auditor of King County and Wm. A. Gaines, as Treasurer of King County, Defendants in Error", the separate writ of error of The City of Seattle was dismissed on motion and the case was affirmed as to Plaintiff in Error, Puget Sound Power & Light Company, the opinion of this court being set forth in 264 U. S. p. 22, 68 L. Ed. 541; that when the remittitur from this court came down to the State Supreme Court and from that court to the trial court, and was there filed, appellee W. W. Shields, as Treasurer of King County attempted but was unable to collect such tax with interest in due course and thereupon prepared and filed with appellee Matt Starwich, as Sheriff of said King County, papers in distraint.

Thereupon the said Matt Starwich as Sheriff of King County pursuant to Sec. 11258 Rem. Comp. Stat. distrained sufficient goods and chattels belonging to the person charged with such tax, namely the Puget Sound Power & Light Company, to pay the same with interest at the rate of fifteen (15%) per cent per annum from the 15th day of March, 1920, together with all accruing costs and in such notice of distraint fixed the 10th day of June, 1924, as the day on which he would sell such goods and chattels for such tax with interest and costs (R. 12, 13);

that thereupon said Puget Sound Power & Light Company brought suit in the United States District Court for the Western District of Washingon, Northern Division, the same being Cause No. 404-E, entitled "Puget Sound Power & Light Company, a corporation, Plaintiff, vs. The City of Seattle, County of King, Matt Starwich as Sheriff of King County and W. W. Shields, as Treasurer of King County, Defendants," to enjoin such sale and to require The City of Seattle to pay to such plaintiff a portion of the amount of such tax by reason of a provision in the agreement of sale of the street railway system in the City of Seattle owned by such plaintiff and in 1919 sold to The City of Seattle; that in such suit The City of Seattle moved to dismiss the bill of complaint as to The City and Defendants County of King, W. W. Shields, as Treasurer and Matt Starwich, as Sheriff of such County made a separate motion to dismiss as to them and each of them; these motions were granted by the court on June 5, 1924 (300 Fed. 441) at which time application for a temporary injunction was denied.

That on June 7, 1924, three days before the date set for the Sheriff's sale the tax with interest to the date of payment, together with all accruing costs was paid by said Company to such Sheriff in the total amount of $655,296.20, as is more particularly shown by the affidavits of said Treasurer and Sheriff attached to this motion to dismiss; that on said date said Puget Sound Power & Light Company

by leave of court filed an amended bill of complaint in said cause against The City of Seattle alone which was likewise dismissed on motion (300 Fed. 443). On appeal to the Circuit Court of Appeals for the Ninth Circuit the action of the District Court was reversed as against The City alone, but affirmed as against appellees County of King, W. W. Shields, as Treasurer, and Matt Starwich, as Sheriff of King County (5 Fed. R. 393, 2d Series); that from such decision of the Circuit Court of Appeals, The City of Seattle applied to this court for a writ of certiorari which was denied by this court on October 19, 1925, in Cause No. 627 October Term, 1925, entitled "The City of Seattle, a Municipal Corporation, Petitioner (Defendant), vs. Puget Sound Power & Light Company, Respondent (Plaintiff)."

That such cause No. 404-E in said District Court is now pending between said plaintiff and The City of Seattle and involves the question as to the liability of The City to the plaintiff for three-fourths of the amount of the tax under the agreement proviso set up in Paragraph II of the supplemental Bill of Complaint of said cause and which appears on page 11 of the record herein.

HOWARD A. HANSON

Subscribed and sworn to before me this 4th day of November, 1925.

(SEAL) ETHEL CURRIER

Notary Public in and for the State of Washington, residing at Seattle.

EXHIBIT "B"

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

OLD COLONY TRUST COMPANY as Trustee, *Appellant*,

—VS.—

THE CITY OF SEATTLE, COUNTY OF KING, W. W. SHIELDS, as Treasurer, and MATT STARWICH, as Sheriff of King County, *Appellees*.

No. 194

AFFIDAVIT OF MATT STARWICH IN SUPPORT OF MOTION TO DISMISS

STATE OF WASHINGTON }
COUNTY OF KING } ss.

MATT STARWICH, being first duly sworn on oath deposes and says: That this affidavit is made in support of the motion to dismiss herein of Appellees; that at all times herein mentioned he has been and now is the duly elected, qualified and acting Sheriff of King County, Washington, and as such Sheriff is one of the Appellees herein; that he has read the affidavit of Howard A. Hanson in support of the motion of Appellees, County of King, W. W. Shields, as Treasurer, and Matt Starwich, as Sheriff of King County, to dismiss the appeal herein; that he is fa-

miliar with the facts stated in said affidavit and that the same are true; that W. W. Shields, as Treasurer of King County, being unable in due course to collect the tax herein involved with interest prepared and filed with affiant as such Sheriff papers in distraint as provided by law; that thereupon, pursuant to Sec. 11258 Rem. Comp. Stat. affiant as such Sheriff proceeded to and did distrain sufficient goods and chattels belonging to the person charged with such taxes to pay the same with interest at the rate of fifteen (15%) per cent per annum from the 15th day of March, 1920, together with all accruing costs and advertised the same as provided by law and in such notice fixed the 10th day of June, 1924, as the day appointed for such sale.

That on the 7th day of June, 1924, the person charged with such taxes, namely, the Puget Sound Power & Light Company paid to affiant the said tax with interest to date of such payment, together with all accruing costs in the total amount of $655,296.20 by its check on the Dexter Horton National Bank of Seattle, Washington, duly certified by the Cashier of said bank, which check on said date in the presence of affiant was photographed, a true photographic print of such check being hereto attached, marked "Exhibit 1" and by reference made a part hereof; that on said date such check was cashed and the amount thereof less the Sheriff's costs, was paid to W. W. Shields, as Treasurer of said King County in full payment of said taxes with interest,

affiant giving his official receipt for the Sheriff's costs; that upon such date affiant as such Sheriff released any and all property embraced in said distraint proceedings and terminated such proceedings by reason of such full payment of taxes, interest and costs.

MATT STARWICH

Subscribed and sworn to before me this 4th day of November, 1925.

ETHEL CURRIER

Notary Public in and for the State of Washington, residing at Seattle.

(SEAL)

Exhibit "1"

PUGET SOUND POWER & LIGHT COMPANY
DEXTER HORTON NATIONAL BANK
SEATTLE, WASH.
JUN - 7 1934
AUDIT NO.
CASH NO. 6573
PAY $655296 AND 20 CTS
$655296.20
IN FULL FOR ACCOUNT REPRESENTED ON REVERSE SIDE OF THIS CHECK
PUGET SOUND POWER & LIGHT COMPANY
ORDER OF
Matt Starwich, Sheriff of King Co.
County-City Bldg.
Seattle, Wash.
CERTIFIED
COUNTERSIGNED

Note: The photograph on the left is that of Mr. W. W. Shields, County Treasurer, on the right Mr. Matt Starwich, County Sheriff. The photographs were taken at the same time for publication in the press and are reproduced from the photographer's pictures.

EXHIBIT "C"

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

OLD COLONY TRUST COMPANY as Trustee, *Appellant*,

—VS.—

THE CITY OF SEATTLE, COUNTY OF KING, W. W. SHIELDS, as Treasurer, and MATT STARWICH, as Sheriff of King County, *Appellees*.

No. 194

AFFIDAVIT OF W. W. SHIELDS IN SUPPORT OF MOTION TO DISMISS

STATE OF WASHINGTON
COUNTY OF KING } ss.

W. W. SHIELDS, being first duly sworn on oath deposes and says: that this affidavit is made in support of the motion to dismiss herein of Appellees; that at all times herein mentioned he has been and now is the duly elected, qualified and acting Treasurer of King County, Washington, and as such Treasurer is one of the appellees herein; that he has read the affidavit of Howard A. Hanson in support of the motion of Appellees, County of King, W. W. Shields, as Treasurer, and Matt Starwich, as Sheriff of King County to dismiss the appeal herein; that he is familiar with the facts stated in said affidavit and that the same are true.

That affiant as Treasurer of King County, being

unable in due course to collect the tax herein involved with interest, prepared and filed with Matt Starwich, as Sheriff of King County, papers in distraint as provided by law; that thereupon and in accordance with the provisions of law the Sheriff proceeded to and did distrain sufficient goods and chattels belonging to the person charged with such taxes to pay the same with interest and all accruing costs and fixed the 10th day of June, 1924, as the day appointed for such sale; that on the 7th day of June, 1924, the person charged with such taxes, namely, the Puget Sound Power & Light Company in the presence of affiant and in his office in the County-City Building, Seattle, Washington, paid to the Sheriff of King County the said tax with interest to such date of payment, together with all accruing costs in the total amount of $655,296.20 by its check on the Dexter Horton National Bank of Seattle, Washington, duly certified by the Cashier of said bank; that on said date the said Matt Starwich as such Sheriff paid the said sum less the Sheriff's costs into the County Treasury and affiant as County Treasurer of King County issued to said Puget Sound Power & Light Company his receipt evidencing the payment in full of such tax with interest.

W. W. SHIELDS

Subscribed and sworn to before me this 4th day of November, 1925.

(SEAL) ETHEL CURRIER

Notary Public in and for the State of Washington, residing at Seattle.

REMINGTON'S COMPILED STATUTES OF WASHINGTON, 1922

"Section 11170.

"On the completion of the equalization of the property of the railroad companies and other property in the state, by the state board of equalization it shall be the duty of the state board of equalization, to apportion the value of the operating properties of such railroad, to the county or counties through or into which the lines thereof may extend, according to the classification and value thereof, in such proportion to the entire value thereof, as the length of the line in each county may bear to the entire length of line within the state, which valuation, together with a description of the railroad property, assessed, giving the name of the company and the length of line in said county, shall be certified by said board, to the county assessor of the proper county. The county assessor shall in like manner distribute the value so certified to him, to the several cities, towns, road districts, school districts and other taxing districts, in his county, entitled to a proportionate value of the operating property of such railroad; and each assessment so apportioned shall be placed upon the tax-rolls of said county, and the taxes extended against the same, as against other property in said county, cities, towns, school, road, and other taxing districts.

"Section 11224.

"When the state board of equalization shall have

completed their equalization, the state auditor shall, within ten days after the adjournment of said board, transmit to each county assessor a transcript of the proceedings of the board, specifying the amount to be levied and collected on said assessment-books for state purposes for such year. He shall also certify to each county assessor the amounts due to each fund and unpaid from such county for the seventh preceding year, which sum shall be added to the amount levied for the current year.

"Section 11231.

"It shall be the duty of county commissioners, city and town councils, and of school directors of school districts, lying wholly, or in part, within the limits of any incorporated city or town, to meet on the first Monday in October, and at the time and place designated in said notice, when and where any taxpayer who may appear shall be heard in favor or against any proposed tax levies. When such hearings shall have been concluded, such county commissioners, city or town councils, and school directors, shall proceed to make, determine, and decide the amount of taxes to be levied upon the current assessment-rolls. All taxes shall be levied or voted in specific sums, and shall not exceed the amount specified in such published estimates.

"Section 11236.

"The county auditor shall extend the taxes upon the assessment-books in the form herein prescribed.

The rate per cent necessary to raise the required amount of the total tax for state, county indebtedness, county current expense, road, bridge, school, special school and incorporated cities, and all other county, school, municipal and state purposes, shall be computed on the assessed valuation as equalized by the county board of equalization as a whole, under the head of consolidated tax. The rate per cent necessary to raise the required amount of any special district tax shall be computed as to the attested valuation of property within such district, as equalized by the county board of equalization; all taxes assessed against any property shall be added together and carried to the total column. In extending any tax, whenever it amounts to a fractional part of a cent greater than five mills, it shall be made one cent, and whenever it amounts to five mills or less than five mills, it shall be dropped. The amount of all taxes shall be entered in the proper columns, as shown by entering the rate per cent of consolidated tax and of such special tax at the head of the proper columns; on the first day of each month the county treasurer shall distribute pro rata, according to the rate of levy for each fund, the amount collected as consolidated tax during the preceding month, and shall certify the same to the county auditor.

"Section 11252.

"The county treasurer shall be the receiver and collector of all taxes extended upon the tax-books of

the county, whether levied for state, county, school, bridge, road, municipal or other purposes, and also of all fines, forfeitures or penalties received by any person or officer for the use of his county. All taxes upon real property made payable by the provisions of this act shall be due and payable to the treasurer as aforesaid on or before the thirty-first day of May in each year, after which date they shall become delinquent, and interest at the rate of twelve per cent per annum shall be charged upon such unpaid taxes from the date of delinquency until paid: Provided, however, when the total amount of tax payable by one person is two dollars or more, then if one-half of such taxes be paid on or before said thirty-first day of May, then the time of payment of the remainder thereof shall be extended and said remainder shall be due and payable on or before the thirtieth day of November following, but if the remaining one-half of such taxes be not paid on or before the thirtieth day of November, then such remaining one-half shall be delinquent, and interest at the rate of twelve per cent per annum shall be charged thereon from the first day of June preceding until paid: Provided further, there shall be an allowance of three per cent rebate to all payers of taxes who shall pay the taxes on real property in one payment and in full on or before the fifteenth day of March next prior to the date of delinquency. All rebates allowed under this section shall be charged to the county current expense fund and all collections from penalties and interest on de-

linquent taxes shall be credited to the current expense fund.

"Section 11255.

"The owner or owners of property against which there are delinquent taxes, shall have the right to pay the current tax without paying any delinquent taxes there may be against said property: Provided, however, that in issuing a receipt for such current tax the county treasurer shall indorse upon the face of such receipt a memorandum of all delinquent taxes against the property therein described, showing the year for which said tax is delinquent and the amount of delinquent tax for each and every year.

"Section 11258.

"On the first Monday in February succeeding the levy of taxes, the county treasurer shall proceed to collect all personal property taxes. He shall give notice by mail to all persons charged with personal property taxes, and if such taxes are not paid on or before the fifteenth day of March of such year, he shall forthwith proceed to collect the same. In the event that he is unable to collect the same in due course, he shall prepare papers in distraint, which shall contain a description of the personal property, the amount of the tax, the amount of accrued interest at the rate of fifteen per cent per annum from March 15th, and the name of the owner or reputed owner, and shall file the same with the county sheriff, who shall immediately without demand or notice dis-

train sufficient goods and chattels belonging to the person charged with such taxes to pay the same with interest at the rate of fifteen (15) per cent per annum from the fifteenth day of March of such year, together with all accruing costs, and shall immediately proceed to advertise the same by posting written notices in three public places in the county in which such property has been levied upon, one of which places shall be at the county courthouse, such notices to state the time when and the place where such property will be sold. If the taxes for which such property is distrained and the interest and cost accruing thereon are not paid before the date appointed for such sale, which shall not be less than ten (10) days after the taking of such property, such sheriff shall proceed to sell such property at public auction, or so much thereof as shall be sufficient to pay such taxes with interest and costs, and shall pay to the treasurer the money so collected at such sale, and if there be any overplus of money arising from the sale of any personal property, the treasurer shall immediately pay such overplus to the owner of the property so sold, or to his legal representative: Provided, that whenever it shall become necessary to distrain any standing timber owned separately from the ownership of the land upon which the same may stand, or any fish-trap, pound-net, reef-net, set-net, drag-seine fishing location, which shall be deemed to have been distrained and taken into possession when the said sheriff shall have, at least thirty (30) days be-

fore the date fixed for the sale thereof, filed with the auditor of the county wherein such property is located, a notice in writing citing that he has distrained such property, describing it, giving the name of the owner or reputed owner, the amount of tax due with interest, and the time and place of sale. A copy of said notice shall also be sent to the owner or reputed owner at his last known address by registered letter at least thirty (30) days prior to the date of sale: And provided, further, that if any personal property upon which taxes have been levied, but not paid, is about to be removed from the county where the same has been assessed, the county treasurer may demand such taxes without the notice provided for in this section, and if necessary may distrain sufficient goods and chattels to pay the same as provided in this act."

FILED
APR 23 1926
WM. R. STANSBURY
CLERK

No. 194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

OLD COLONY TRUST COMPANY, as Trustee,
Appellant,

—vs.—

THE CITY OF SEATTLE, COUNTY OF KING, W. W. SHIELDS, as Treasurer, and MATT STARWICH, as Sheriff of King County,
Appellees.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. EDWARD E. CUSHMAN,
United States District Judge

SUPPLEMENTAL MOTION TO DISMISS APPEAL

EWING D. COLVIN,
HOWARD A. HANSON,
Solicitors for Appellees, County of King, W. W. Shields, as Treasurer of King County, Matt Starwich, as Sheriff of King County,
431 County-City Building,
Seattle, Washington.

THOMAS J. L. KENNEDY,
GEORGE A. MEAGHER,
Solicitors for Appellee, The City of Seattle,
527 County-City Building, Seattle, Washington.

THE ARGUS PRESS, SEATTLE

No. 194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

OLD COLONY TRUST COMPANY, as Trustee,
—VS.— *Appellant*,

THE CITY OF SEATTLE, COUNTY OF KING, W. W. SHIELDS, as Treasurer, and MATT STARWICH, as Sheriff of King County,
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THE ARGUS PRESS, SEATTLE

J-43435

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

OLD COLONY TRUST COMPANY, as Trustee, —vs.— *Appellant,* THE CITY OF SEATTLE, COUNTY OF KING, W. W. SHIELDS, as Treasurer, and MATT STARWICH, as Sheriff of King County, *Appellees.*		No. 194

SUPPLEMENTAL MOTION TO DISMISS APPEAL

Not waiving their original motion to dismiss the appeal herein, appellees hereby move this court to dismiss the appeal as to them, and each of them, for the following reasons:

I.

That because appellant has assigned all its right, title and interest in the subject matter of the above entitled suit to the Puget Sound Power & Light Company, a corporation, there is now no actual controversy involving real and substantial rights between the parties, and no subject matter upon which the judgment of this court can operate.

II.

That there is a defect of parties appellant in that it appears that the Puget Sound Power & Light Company, a corporation, is an indispensable and the real

party in interest herein, and is not a party appellant hereto.

This motion is based upon the records and files in the above entitled cause and the affidavit of George A. Meagher, Solicitor for Appellee, The City of Seattle, said affidavit being appended to this motion as Exhibit "A".

STATEMENT

Oral argument herein was had on March 5, 1926. Since that date the case of "*Puget Sound Power & Light Company*, a corporation, Plaintiff, *v. The City of Seattle*, a municipal corporation, Defendant," being Cause No. 404—In Equity, in the District Court of the United States for the Western District of Washington, Northern Division, came on for trial on the merits, upon the conclusion of which trial the District Court rendered its decision in favor of plaintiff and against defendant for three-fourths of the principal and interest of the street railway tax for 1919, being the tax involved in the above entitled proceedings.

During the progress of such trial, Mr. George A. Meagher, counsel for defendant, The City of Seattle, in that cause and in the case at bar, urged that the plaintiff in such cause was not entitled to maintain its action in the District Court, since the Old Colony Trust Company, as Trustee, had a suit pending in the United States Supreme Court in which it claimed to have paid part of this tax and interest and was litigating its claimed rights thereunder (p. 14).

Mr. James B. Howe, counsel for plaintiff, Puget Sound Power & Light Company, in the case in the District Court and counsel for appellant in the case at bar, thereupon stated in open court that the Old Colony Trust Company as Trustee, had assigned to said Power & Light Company all its interest in and claim to the recovery of any portion of said tax and interest and, hence that said Power & Light Company

was entitled to claim recovery for all of the three-fourths of the tax and interest under its contract with the City of Seattle for the purchase of the street car system. Mr. Howe, as attorney for said Power & Light Company, then on March 22, 1926, offered, and the court admitted in evidence, Plaintiff's Exhibits "9" and "10" in such cause (p. 15). These exhibits are set up as part of the affidavit of Mr. George A. Meagher in support of this supplemental motion to dismiss (See pp. 16-26 herein).

The tax was paid under protest on June 7, 1924. These Exhibits "9" and "10" disclose that negotiations between the Old Colony Trust Company, as Trustee, and the Puget Sound Power & Light Company, respecting their interests in the recovery of any portion of this tax, were concluded on July 1, 1924, culminating in the satisfaction of the mortgage upon which appellant relies in the case at bar and which is referred to on pages 4 and 5 of the printed record herein, and in the assignment referred to by Mr. Howe. Thereafter on September 8, 1924, the petition for appeal herein was filed (R. 22).

Exhibits "9" and "10" thus show that since July 1, 1924, the Old Colony Trust Company, as Trustee, has had no interest in the subject matter involved in the above entitled cause; that there is now no controversy involving real and substantial rights between the parties hereto and no subject matter upon which the judgment of this court can operate. Also that since such date the Power & Light Company has

been the real party in interest. Hence it has been waging two suits—one in its own name and one in the name of the Old Colony Trust Company, as Trustee, for the recovery from the City of Seattle of the same thing—three-fourths of the tax with interest. The suit in its own name has come on for trial on the merits in the District Court and a decision in its favor has been rendered against the City of Seattle for three-fourths of the tax and interest. Not only was a decision rendered, but on April 5, 1926, a final decree was entered in its favor in conformity with said decision (See Exhibit "2", attached to affidavit of George A. Meagher, pp. 26-30).

Whatever may be the outcome of that decree on appeal, if appealed, it clearly appears that in so far as the Puget Sound Power & Light Company is concerned, it has no right to prosecute the case at bar in its own name or in the name of the appellant herein. The other suit is pending between itself as plaintiff and the City as defendant, all other appellees being dismissed and the dismissal affirmed, involving the same subject matter and the same ultimate relief, namely; recovery from the City of Seattle of three-fourths of the tax with interest and subrogation to the tax lien to such extent.

For previous reported decisions in this District Court suit see

Puget Sound Power & Light Company v. Seattle, et al., 300 Fed. 441, also 443;

Puget Sound Power & Light Company v. Se-

attle, et al., (C. C. A.) 5 Fed. Rep. 2d Series, 393.

ARGUMENT

Under Equity Rule 37, the appeal at bar must be prosecuted in the name of the real party in interest.

In view of its assignment, the Power Company is an indispensable party hereto and its absence prevents the court from proceeding, except to dismiss.

Young v. Cushing, Fed. Cas. 18156;
Mechanics' Bank v. Seton, 1 Peters 299;
Mallow v. Hinde, 12 Wheat. 193;
Gregory v. Stetson, 133 U. S. 579;
Ribon v. Chicago, etc. R. Co., 16 Wall. 446;
Russell v. Clark, 7 Cranch. 69;
Barney v. Baltimore, 6 Wall. 280.

Within a week after the judgment on which this appeal is founded (R. 20) was entered by the District Court, the mortgage, on which appellant based its suit was satisfied, and appellant assigned any interest it had in the recovery of this tax to the Puget Sound Power & Light Company.

Appellant herein, in its supplemental bill (R. 13) alleged:

> "8. If the plaintiff by reason of such acts should be compelled to pay such taxes or any portion thereof, then the plaintiff should be subrogated to the lien of the State of Washington, the County of King, School District No. 1 and the City of Seattle for such taxes upon the street railway property of the City of Seattle upon which

such taxes are specific liens, and the City of Seattle should be compelled to pay its portion of all of such taxes to the plaintiff in accordance with the contract between the City and the Company."

Whatever may have been the extent of its contribution to this tax payment, the Power Company within a month reimbursed it and also paid off the mortgage itself.

It now appears that it is the Power Company which in reality perfected and prosecuted this appeal. Yet all the while it had a separate suit in its own name against the City of Seattle to recover three-fourths of the tax and interest and to be subrogated to such extent to the tax lien.

In its original bill against the City, the Power Company prayed (300 Fed. 446):

"' * * * that the plaintiff have a decree against the city requiring it to repay to the plaintiff forthwith three-fourths of the amount of such taxes, with interest and costs, and that the defendant be subrogated to the lien of such taxes upon the street railway property of the city of Seattle'."

After the original bill had been dismissed on motion, and the tax had been paid, the Power Company filed an amended and supplemental bill against the City alone alleging (5 Fed. Rep. 2d Series 395):

" * * * that the company and the Old Colony Trust Company, mortgagee trustee, had

paid in full the taxes upon the street railway property for the year 1919, with interest and costs, in order to save and protect the other property of the company levied upon by the sheriff under and by virtue of the distress warrant, and asked, in addition to the other relief sought, that the company be subrogated to the lien of the taxes on the street railway property."

The decree entered April 5, 1926 (pp. 26-30) is upon this amended and supplemental bill and is for $545,370.23, which sum the decree recites

> " * * * is the portion of the taxes for the year 1919 upon such property subject to which the defendant purchased the property from the plaintiff and which defendant assumed and agreed to pay, together with interest thereon and the Sheriff's costs of collecting the same."

and further that

> "The plaintiff is subrogated to the lien of the State, the County of King, School District No. 1 and City of Seattle taxes for the year 1919 upon such property to the extent of such portion with interest thereon and sheriff's costs of collection with interest, amounting to the total sum of five hundred forty-five thousand, three hundred and seventy dollars and twenty-three cents ($545,370.23), with interest from this date on such sum until paid."

Since July 1, 1924, the Power Company has been the sole party in interest in this tax controversy. On

May 18, 1925, the Circuit Court of Appeals denied the City's petition for rehearing (5 Fed. Rep. 2d Series 393). Since that time the Power Company has had a clear right to a hearing on the merits on its entire claim to recover from the City three-fourths of the tax and interest and for subrogation. Yet after that date, and on September 29, 1925, appellant's brief herein was served on appellees and subsequent proceedings were had herein including hearing on the appeal.

This court, with appellate jurisdiction only, cannot substitute the Power Company for the Trust Company, since that would be an exercise of original jurisdiction.

U. S. ex rel. Lewis v. Boutwell, 17 Wall. 604.

Only a party to the suit is entitled ordinarily to appeal.

Ex Parte Cutting, 94 U. S. 14;
Ex Parte Cockcroft, 104 U. S. 578;
In Re Woerishoffer, 74 Fed. 915;
Guion v. Liverpool, etc. Co., 109 U. S. 173.

If the Power Company had sought to appeal this case in its own name and interest, it should have set up the facts in a petition for appeal, praying for an order of intervention allowing it to become a party for the purpose of appeal.

Davis v. Merc. Trust Co., 152 U. S. 590.

This the Power Company had ample time to do since its assignment was dated only five days after the date of the judgment appealed from (R. 20). Such inter-

vention, however, rests within the discretion of the court, and if the petition is refused *mandamus* will not lie.

In Re Columbia Real Estate Co., 112 Fed. 643.

The appeal should be dismissed.

San Mateo County v. So. P. R. Co., 116 U. S. 138;

California v. San Pablo & T. R. Co., 149 U. S. 308;

East Tennessee V. & G. R. Co. v. So. Teleg. Co., 125 U. S. 695;

Little v. Bowers, 134 U. S. 547;

Cheong Ah Moy v. U. S., 113 U. S. 216;

Allen v. Georgia, 166 U. S. 138;

Kimball v. Kimball, 174 U. S. 158;

Mills v. Green, 159 U. S. 651.

Respectfully submitted,

EWING D. COLVIN,
HOWARD A. HANSON,
Counsel for Appellees, except The City of Seattle.

THOMAS J. L. KENNEDY,
GEORGE A. MEAGHER,
Counsel for Appellee, The City of Seattle.

APPENDIX

(EXHIBIT "A")

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

OLD COLONY TRUST COMPANY, as Trustee, *Appellant*, —vs.— THE CITY OF SEATTLE, COUNTY OF KING, W. W. SHIELDS, as Treasurer, and MATT STARWICH, as Sheriff of King County, *Appellees.*	No. 194

Affidavit of George A. Meagher in Support of Motion to Dismiss

STATE OF WASHINGTON, } ss.
COUNTY OF KING, }

GEORGE A. MEAGHER, being first duly sworn, upon oath deposes and says:

That this affidavit is made in support of the motion to dismiss herein of appellees;

That affiant is an Attorney-at-Law, duly admitted to practice before the bar of this court; that at all times herein mentioned he has been and now is Assistant Corporation Counsel of the City of Seattle, Washington, and as such has had charge for the City of Seattle of the litigation of the above entitled cause over the 1919 personal property tax herein involved;

That on the 5th day of March, 1926, the above entitled court heard argument on the appeal herein and upon the motion of appellees to dismiss such appeal·

That subsequent thereto, and on the 22nd day of March, 1926, there came on for trial in the District Court of the United States for the Western District of Washington, Northern Division, the case of *Puget Sound Power & Light Company v. The City of Seattle*, Cause No. 404 In Equity, being the same case decided by the United States Circuit Court of Appeals for the Ninth Circuit, reported in 5 Fed. Rep. 2d Series, 393, the said case being an action by the plaintiff to recover from the defendant three-fourths of the amount of the principal and interest of the personal property tax for 1919 levied against the street railway system in the City of Seattle, which property was purchased by the City of Seattle, and in which matter the plaintiff claimed that the City had agreed to pay three-fourths of said tax;

That during the progress of such trial on the merits in the District Court, upon, to-wit: the 22nd day of March, 1926, affiant as counsel for the defendant, The City of Seattle, objected that the Power Company was not entitled to maintain its action for the recovery of said three-fourths of such tax, for the reason that in the amended and supplemental bill of complaint of the Power Company it was alleged that the entire tax with interest and cost was paid by the plaintiff and the Old Colony Trust Company, Trustee, and that by reason thereof the "Trustee" was an essential party to the action and further that the Old Col-

ony Trust Company was maintaining an action then pending in the United States Supreme Court for the recovery from the City of the entire three-fourths of said tax;

That thereupon, Mr. James B. Howe, attorney for plaintiff, Puget Sound Power & Light Company, stated in substance in open court that the Old Colony Trust Company had assigned all of its right, title and interest in such matter to plaintiff, Puget Sound Power & Light Company, and in support of such contention offered, and the court admitted in evidence, plaintiff's Exhibits "9" and "10", which are hereto attached, marked Exhibit "1", and by reference made a part of this affidavit;

That upon, to-wit; the 5th day of April, 1926, final decree was entered by the District Court above mentioned in said cause in favor of the Puget Sound Power & Light Company and against The City of Seattle for said three-fourths of such tax, principal and interest, a copy of which decree is attached to this affidavit, marked Exhibit "2", and by reference made a part hereof.

GEORGE A. MEAGHER.

Subscribed and sworn to before me this 13th day of April, 1926.

(Seal)

R. B. MCCLINTON,
Notary Public in and for the State of Washington, residing at Seattle.

EXHIBIT 1

ENDORSED:
Rec'd June 26, 1924 No. 404 COPY
By MAILING DEPT. Plf. Ex 10
W. A. C.
Ans'd 6/25 STONE & WEBSTER
By C. B. H.
NEW YORK BOSTON CHICAGO

Boston, Mass., June 20, 1924.

OLD COLONY TRUST COMPANY,
Court Street,
Boston, Massachusetts.

Dear Sirs:

This is to confirm and evidence the arrangement and agreement with you as Trustee under the General and Refunding Mortgage dated May 2, 1921, from Puget Sound Power & Light Company relative to the litigation in the State of Washington (including the suit brought in your name as Trustee under said mortgage) with reference to the 1919 taxes assessed against Puget Sound Power & Light Company on the street railway property in Seattle which was conveyed by Puget Sound Power & Light Company to the City of Seattle on March 31, 1919, and relative to the payment of such taxes under protest.

In order that other property of Puget Sound Power and Light Company levied upon by the sheriff and included with the property subject to the lien of such General and Refunding Mort-

gage dated May 2, 1921, would not be sold under such levy, such taxes were paid on June 7, 1924, under protest, by your company as Trustee aforesaid and by the undersigned Puget Sound Power & Light Company. Part of the money necessary for this purpose was advanced by you to us against our demand note with the understanding that it would, with other moneys, be used for this purpose. Such payment of said taxes under protest was made with the further understanding between us that so far as such payment under protest carried with it subrogation your company as Trustee aforesaid was to be subrogated to the lien of such taxes upon the street railway property conveyed by us to the City of Seattle as aforesaid on March 31, 1919, and against which the taxes paid were actually assessed, and that, subject to your rights, Puget Sound Power & Light Company likewise was to be subrogated to the lien of such taxes upon such street railway property.

O.C.T.Co. June 20, 1924.

We are to protect and save you harmless from expense and liability in these matters as provided by the express terms of the General and Refunding Mortgage and in the event that such General and Refunding Mortgage is discharged before a final settlement and adjustment of this 1919 litigated tax matter is reached, either in the pending suits or otherwise, you have agreed to execute an

assignment to Puget Sound Power & Light Company of all your claims in this pending 1919 tax litigation, and particularly the claim for subrogation.

We would appreciate written acknowledgment from you confirming that the foregoing correctly evidences the arrangement and agreement between us.

Very truly yours,
PUGET SOUND POWER & LIGHT COMPANY.
By EDWARD T. STEEL,
Vice Pres.

COPY

OLD COLONY TRUST COMPANY
(Balance of heading omitted)
17 Court Street, Boston, Mass.,
June 23, 1924.

PUGET SOUND POWER & LIGHT CO.,
Stone & Webster, Inc.,
Boston, Massachusetts.

Dear Sirs:—

We acknowledge receipt of your letter of June 20, concerning 1919 taxes assessed against your company and confirm your statement of the situation in regard to their payment.

Yours very truly,
C. B. HUMPHREY,
Vice-President.

COPY

OLD COLONY TRUST COMPANY

* * *
*
* * *

17 Court Street, Boston, Mass.,
July 1, 1924.

PUGET SOUND POWER & LIGHT CO.,
c/o Stone & Webster, Inc.,
147 Milk Street,
Boston, Mass.

Dear Sirs:—

Referring to your letter of June 20, 1924, and our reply thereto dated June 23, 1924, covering the arrangement and agreement between us in the matter of the litigation in the State of Washington (including the suit brought in our name as trustee under the General and Refunding Mortgage to your company dated May 2, 1921) with reference to the 1919 taxes assessed against Puget Sound Power & Light Company on the street railway property in the City of Seattle conveyed by Puget Sound Power & Light Company to the City of Seattle on March 31, 1919, and in connection with the payment of such taxes, which was made under protest, we propose today as trustee to execute and deliver Discharge of the said General and Refunding Mortgage to your company dated May 2, 1921, provision having been made for the call and payment of all bonds outstanding and secured by such mortgage.

In view of such Discharge of the General and

Refunding Mortgage and inasmuch as no final settlement and adjustment of this 1919 litigated tax matter has as yet been reached either in the pending suits or otherwise, the undersigned, Old Colony Trust Company, does now, pursuant to the arrangement and agreement as set forth in said letters of June 20, 1924, and June 23, 1924, above referred to, hereby assign, transfer and set over to Puget Sound Power & Light Company all of the undersigned's right, title, interest and claims in the said pending 1919 tax matter and litigation and does hereby subrogate said Puget Sound Power & Light Company to all of the rights and claims of the undersigned, Old Colony Trust Company, with respect thereto, and with full power and authority in said Puget Sound Power & Light Company, for its own use and benefit, but at its own cost, and either in its own name or in the name of Old Colony Trust Company, to enforce any and all such rights and claims and any and all other rights and claims with respect thereto, and otherwise to prosecute and withdraw any suits or proceedings at law or in equity therefor, and otherwise at its own cost to take all legal measures which may be proper or necessary for the complete recovery and enjoyment of the rights and claims hereby assigned.

Very truly yours,

C. B. HUMPHREY,
Vice-President.

No. 404
Plf Ex 9

VOLUME 901—MORTGAGES
Page 314
OLD COLONY TRUST COMPANY
To
PUGET SOUND POWER & LIGHT COMPANY,

SATISFACTION OF MORTGAGE

KNOW ALL MEN BY THESE PRESENTS: THAT Whereas Puget Sound Power & Light Company, a Massachusetts Corporation, to secure its general and refunding mortgage gold bonds to be issued thereunder, executed, acknowledged and delivered to Old Colony Trust Company, a Massachusetts corporation, as Trustee, a certain indenture of Trust or Mortgage dated as of the 2nd day of May, 1921, and recorded in the office of the Auditor of King County (Washington), in Volume 822 of Mortgages at page 1 and there left on file as a chattel mortgage being Mortgage File No. 68307, and elsewhere in the State of Washington; and

Whereas provision for the call of all bonds now outstanding thereunder, and for the payment of the principal thereof and interest thereon to the date fixed for said payment, and of the premiums thereon, has been duly made by said Puget Sound Power & Light Company by depositing with Old Colony Trust Company, Trustee as aforesaid the necessary cash therefor: and

Whereas said Puget Sound Power & Light Company has requested said Old Colony Trust Company, Trustee, as aforesaid, to cancel and discharge the lien of said indenture of Trust or mortgage, and (to such extent only as the same are supplemental to said indenture of Trust or Mortgage) all indentures supplemental thereto:

Now, Therefore, said Old Colony Trust Company as Trustees under said indenture of Trust or Mortgage dated as of May 2, 1921, pursuant to authority therein contained and pursuant to all other authority vested in it, in consideration of One Dollar and other valuable considerations to it in hand paid, the receipt whereof is hereby acknowledged, hereby acknowledges satisfaction of and cancels and discharges said indenture of Trust or Mortgage, and (to such extent only as the same are supplemental to said indenture of Trust or Mortgage) all indentures supplemental thereto and hereby releases, quit claims, assigns, transfers, and set over unto said Puget Sound Power & Light Company as Trustees, its successors and assigns, all right, title and interest acquired by said Old Colony Trust Company as Trustee as aforesaid under and by virtue of said indenture of Trust or Mortgage and/or said indentures supplemental thereto in and to the property therein described and/or mortgaged. To Have and To Hold the premises hereby released

unto said Puget Sound Power & Light Company, its successors and assigns, forever.

In Witness Whereof, Old Colony Trust Company has caused these presents as well as fifteen other instruments of discharge of like tenor and effect, to be executed by C. B. Humphrey, Vice-President, and has caused its corporate seal to be hereto affixed and attested by G. A. Chisholm its Assistant Secretary, on this first day of July, 1924.

(O. C. T. Co. Corp. Seal)

OLD COLONY TRUST COMPANY,
By C. B. HUMPHREY,
Vice-President.

Attest:
G. A. CHISHOLM,
Assistant Secretary.

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF SUFFOLK } ss.

On this 1st day of July, 1924, before me personally appeared C. B. Humphrey and G. A. Chisholm, to me known to be the Vice-President and Assistant Secretary of the Corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said
compared with record H. P.
corporation for the uses and purposes therein mentioned, and on oath stated that they were

authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

(W. G. L. Notarial Seal)

WARREN G. LAWSON,
Notary Public in and for the Commonwealth of Massachusetts, residing at Arlington, Mass.

My commission expires November 7, 1927.

Filed for record at request of Mortgagee July 8, 1924, at 12 min. past 4 P. M.

D. E. FERGUSON,
County Auditor.

Compared with Record H. P.

COUNTY OF KING,
STATE OF WASHINGTON, } ss.

I, D. E. FERGUSON, Auditor of King County, State of Washington, and ex-officio Recorder of Deeds, and the legal keeper of the records hereinafter mentioned, in and for said County, do hereby certify the above and foregoing to be a true and correct copy of a SATISFACTION OF MORTGAGE as recorded in this office in Vol. 901 of Mortgages, page 314, and Chattel Mortgage file 68307, Records of King County.

WITNESS my hand and official seal this 19th day of March, 1926.

D. E. FERGUSON,
Auditor of King County, Washington.
By S. C. JOHN, *Deputy.*

(SEAL)

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 24, 1926, Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy.

No. A 226

UNITED STATES OF AMERICA
WESTERN DISTRICT OF WASHINGTON } ss.

I, ED. M. LAKIN, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that I have compared the foregoing copy with the original Plaintiff's Exhibits Nos. 9 and 10, introduced and used in evidence at the trial of the above entitled cause Mar. 22 26, in the foregoing entitled cause, now on file and of record in my office at Seattle, and that the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of said Court, this 1st day of April, 1926.

ED. M. LAKIN, Clerk.
By T. W. EGGER, Deputy.

(Seal of the United States District Court, Western District of Washington)

(ENDORSED ON BACK):

No. 404

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE
WESTERN DISTRICT OF
WASHINGTON

PUGET SOUND POWER & LIGHT CO.
VS.
THE CITY OF SEATTLE, *et al*,
CERTIFIED COPY OF
Plaintiff's Exhibits Nos.
9 and 10.

EXHIBIT 2

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

PUGET SOUND POWER & LIGHT COMPANY, *Plaintiff*, vs. THE CITY OF SEATTLE, a Municipal Corporation, *Defendant*.	No. 404. IN EQUITY. **DECREE**

This cause came on to be heard at this term of court and was argued by counsel and thereupon, upon consideration thereof,

It is by the court ORDERED, ADJUDGED and DECREED as follows:

1. That the plaintiff, Puget Sound Power & Light Company, recover of and from the defendant, The City of Seattle, the sum of five hundred forty-five thousand, three hundred and seventy dollars and twenty-three cents ($545,370.23), together with its costs and disbursements in this suit as taxed by the clerk of this court.

2. That such sum is hereby decreed to be a lien upon the street railway property sold by the plaintiff to the defendant and described in Ordinance No. 39025 of The City of Seattle, approved December 31, 1918, and in the contract executed by the plaintiff and defendant on February 10, 1919, and the deed executed by the plaintiff and delivered to the defendant and accepted by the defendant on March 31, 1919.

3. That such sum is the portion of the taxes for the year 1919 upon such property subject to which the defendant purchased the property from the plaintiff and which defendant assumed and agreed to pay, together with interest thereon and the sheriff's costs of collecting the same.

4. The plaintiff is subrogated to the lien of the State, the County of King, School District No. 1 and City of Seattle taxes for the year 1919 upon such property to the extent of such portion with interest thereon and sheriff's costs of collection with interest, amounting to the total sum of five hundred forty-five thousand, three hundred

and seventy dollars and twenty-three cents ($545,370.23), with interest from this date on such sum until paid.

5. That if the defendant, The City of Seattle, fail to pay to the plaintiff within NINETY days from this date said sum of five hundred forty-five thousand, three hundred and seventy dollars and twenty-three cents ($545,370.23), with interest from this date and the costs of this suit, an order for the sale of such property shall be issued and such property shall be sold by the marshal of this court, after advertising the sale in the manner provided by law and the rules of this court for the sale of property under execution issuing from this court, and the proceeds of such sale after payment to the plaintiff of the amount herein decreed to be paid by the defendant, The City of Seattle, to the plaintiff, shall be paid out as this court shall hereafter order.

6. This court retains jurisdiction of this cause for the purpose of enforcing this decree and the plaintiff is hereby authorized to apply to this court for any and all further orders which may be necessary or proper to enforce this decree and each and every part thereof.

xxxxxxxxx BOURQUIN,
Judge of the United States District Court, Presiding in the District Court of the United States, for the Western District of Washington.

Dated April 5, 1926.

WESTERN DISTRICT OF WASHINGTON }
UNITED STATES OF AMERICA } ss.

I, ED. M. LAKIN, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that I have compared the foregoing copy with the original

DECREE

in the foregoing entitled cause, now on file and of record in my office at Seattle, and that the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of said Court, this 6th day of April, 1926.

ED. M. LAKIN, Clerk,
By S. M. H. COOK, Deputy.

(Seal of the United States District Court, Western District of Washington)

(ENDORSED ON BACK):

No. 404

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE
WESTERN DISTRICT OF
WASHINGTON

Puget Sound Power & Light Company,
Plaintiff,

VS.

The City of Seattle, a Municipal Corporation,
Defendant.

CERTIFIED COPY OF
DECREE

SUPREME COURT OF THE UNITED STATES.

No. 194.—October Term, 1925.

Old Colony Trust Company, Appellant, *vs.* City of Seattle et al.	Appeal from the District Court of the United States for the Western District of Washington.

[June 1, 1926.]

Mr. Justice Van Devanter delivered the opinion of the Court.

In the beginning of the year 1919 the Puget Sound Power & Light Company owned and was operating two public utilities in the City of Seattle—one a power and lighting system and the other a street railway system. It still owns and operates the power and lighting system, and the Old Colony Trust Company is the trustee in a mortgage which was given thereon in 1921 to secure a large issue of bonds still outstanding.

The City of Seattle now owns and operates the street railway system. The transfer from the Puget Sound Company to the city was effected March 31, 1919, under a contract between them entered into six weeks before. Anticipating that the system would be taxed for that year by reason of the company's ownership in the early months, they stipulated in the contract, and again in the deed of transfer, that "state, county and municipal taxes" laid on the property for 1919 should be borne and paid by them in proportions conforming to their respective periods of possession during the year. On that basis the company became obligated to pay one-fourth and the city three-fourths.

Shortly after the transfer state, county and municipal taxes aggregating over $400,000 were laid on the property for the year 1919. Of that amount over $179,000 represented taxes imposed by the city. The taxes became a lien on the property March 15, 1919, and were listed against the company in the tax records by reason of its ownership on that date. The county treasurer was to collect the taxes and pay the money over to the State, county

and city in definite proportions. If it became necessary to collect through distraint and sale that was to be done through the sheriff.

When the taxes became due the city refused to pay any part of them; and the county treasurer refused to receive from the company the part allotted to it by the contract and deed of transfer, and also refused to receive from it the whole of the state and county taxes unless it also paid the city taxes. Then, because the company would not accede to paying all, the treasurer caused the sheriff to take steps to collect the whole out of the power and lighting system by distraint and sale.

The present suit was brought in the federal district court by the Old Colony Trust Company, the mortgagee of the power and lighting system, to prevent the threatened distraint and sale of that property to pay the taxes so laid on the street railway property. The bill grounded the jurisdiction on diverse citizenship, the plaintiff being a Massachusetts corporation and the defendants being public corporations and individual citizens of the State of Washington. The original bill was brought when the sheriff was about to distrain the property. Besides setting forth the matters we have stated, it charged that the defendants were acting in concert and collusion to collect out of the mortgaged power and lighting property the taxes which had been laid on the street railway property and made a special lien thereon, and thus to relieve the city from the performance of its obligation under the contract and deed. The principal prayer was that the defendants be enjoined from resorting to the mortgaged property until after appropriate steps were taken to collect the taxes out of the property on which they were laid and were a lien. There was also a prayer for an interlocutory injunction. After the bill was filed the sheriff distrained the mortgaged property, as before threatened, and gave public notice of intended sale. This was set up by the court's leave in a supplemental bill, which repeated the prayers of the original bill and prayed further that the plaintiff, if coerced by the threatened sale into paying the taxes, be accorded the benefit of the lien on the street railway property.

The defendants appeared and moved that the two bills—original and supplemental—be dismissed for want of jurisdiction of the subject matter and want of equity, both said to be apparent on the face of the bills. After a hearing on the prayer for an inter-

locutory injunction and the motion to dismiss, the prayer for the injunction was refused; and three weeks later a decree was entered dismissing the bills for want of jurisdiction. The court allowed a direct appeal to this Court, and also certified that the sole ground of the dismissal was that the suit was, in effect, a suit against the State and therefore not cognizable in a federal district court. The statute in force when the appeal was taken limits the consideration here to the jurisdictional question shown in the certificate.

The defendants ask that the appeal be dismissed on two grounds in support of which they make a showing by affidavits. One ground is that the taxes have been paid and that this has put an end to the effort to collect them from the mortgaged property. The showing is that the taxes were paid by the mortgagor almost three weeks prior to the decree of dismissal. The plaintiff makes a counter showing that the payment was made by it and the mortgagor acting together; that they were coerced into this by an impending sale which the court refused to restrain; and that they at the time not only protested that the distraint and intended sale were arbitrary and an abusive use of legal process but reserved all their legal and equitable rights. Obviously the fact of payment and its legal effect pertain to the merits and cannot be considered on this jurisdictional appeal. The other ground is that since the appeal was taken a decree has been rendered in another suit between the mortgagor and some or all of the defendants which determined the questions relating to these taxes. That decree may have a bearing on the merits, but affords no ground for dismissing this appeal. *Illinois Central R. R. Co.* v. *Adams*, 180 U. S. 28, 31; *Male* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 240 U. S. 97, 99.

We come then to the question whether the suit was in effect a suit against the State. If it was, the court below was forbidden by the Eleventh Amendment to the Constitution to take jurisdiction of it; otherwise the jurisdiction was plain.

The bills did not name the State as a defendant; nor did they complain of any act or omission by it, or seek any relief against it. They did show that some of the taxes were state taxes and when collected were to be paid over to the State. But they were not directed against the collection of the taxes. On the contrary, they distinctly treated the taxes as valid and collectable. The complaint

was that those who were attempting the collection were wrongfully pursuing a course which was so much in violation of the rights of the plaintiff as to entitle it to an injunction—not against collection, but against that course of action. On this point the bills alleged that the street railway property on which the taxes were laid and were a special lien was readily available and amply sufficient to satisfy them; that the city in acquiring that property had engaged to pay three-fourths of them; and that with knowledge of these matters the defendants wrongfully and collusively entered into an arrangement to refrain from collecting any part of the taxes out of the street railway property or from the city and to collect them out of the power and lighting property which was mortgaged to the plaintiff; and that the distraint and threatened sale were in pursuance of that arangement and intended to relieve the city from its obligation through a sacrifice of the plaintiff's mortgage security. In short, the charge was that the defendants were wrongfully and abusively using the process of collection for a purpose and in a mode at variance with applicable legal and equitable principles and hurtful to the plaintiff.

We think it apparent from this review of the bills that the suit was not in name or in effect a suit against the State, but only a suit against state agents to restrain them from wrongful acts threatened and attempted under color of their agency.

The test to be applied is illustrated in *Hopkins* v. *Clemson College*, 221 U. S. 636. There a state agent when sued on account of a wrongful act done under color of the agency advanced the contention that the State was a necessary party and that its immunity from suit extended to the agent. But this Court, on a full review of prior decisions, rejected the contention and said (p. 642):

"But immunity from suit is a high attribute of sovereignty—a prerogative of the State itself—which cannot be availed of by public agents when sued for their own torts. The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the State's citizens. To grant them such immunity would be to create a privileged class free from liability from wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law."

In *Poindexter* v. *Greenhow*, 114 U. S. 270, 285, *et seq.*, the question presented was whether a suit against a tax collector to recover

specific property which he had distrained for a state tax and was proceeding to sell was in substance a suit against the State. Prior to the distraint the plaintiff had tendered in payment of the tax certain coupons from state bonds, and the collector had rejected them as not receivable for the tax. The plaintiff stood on the tender and after the distraint brought the suit on the theory that the tender was valid and the subsequent distraint wrongful. This Court held that the suit was not against the State in form or in substance, but against the collector for his personal wrong. In the opinion it was said (pp. 293, 299):

"Tried by every test which has been judicially suggested for the determination of the question, this cannot be considered to be a suit against the state. . . . His [the plaintiff's] tender, as we have already seen, was equivalent to payment so far as concerns the legality of all subsequent steps by the collector to enforce payment by distraint of his property. He has the right to say he will not pay the amount a second time, even for the privilege of recovering it back. And if he chooses to stand upon a lawful payment once made, he asks no remedy to recover back taxes illegally collected, but may resist the exaction, and treat as a wrongdoer the officer who seizes his property to enforce it."

Other cases well in point, although not relating to taxes, are *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 619; *Johnson* v. *Lankford*, 245 U. S. 541.

The dismissal below for want of jurisdiction was error.

Decree reversed.

Mr. Justice HOLMES did not participate in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.